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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

LOUIS JUAN DIAZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

SHERMAN M. ELLISON, Esq.
State Bar No. 45102
9th Floor
15303 Ventura Boulevard
Sherman Oaks, California 91403
Telephone: 818/994-8888

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION(S) PRESENTED

1. Whether the Ninth Circuit and the District Court purposefully disregarded and ignored U.S. Supreme Court precedent [to wit, *Kyles v. Whitley* (1995) 115 S.Ct. 1555] in order to erroneously affirm the Petitioner's conviction and then hid their rulings in "Not For Publication" orders and opinions?

2. Whether production by the government of exculpatory materials, proper prosecutorial conduct, and effective performance by Petitioner's trial counsel would have resulted in acquittal or a mistrial?

3. Whether the Ninth Circuit's *"unwritten policy"* of *never granting review* to a *"Not For Publication"* opinion . . . by way of a Petition for Rehearing and/or Suggestion for Rehearing En Banc . . . violates "substantive" and/or "procedural" Due Process?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, LOUIS JUAN DIAZ, respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court of Oregon's denial of Petitioner's Petition for Writ of Habeas Corpus [28 U.S.C. § 2255] and requests for an evidentiary hearing thereon.

The denial of the habeas corpus petition was based upon clear errors of law and the misapplication of the doctrines and rules of law expressed in *Brady v. Maryland*, 373 U.S. 83 (1963), its progeny, and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), *inter alia*.

OPINIONS BELOW

The Memorandum disposition of the Ninth Circuit Court of Appeals, filed on July 31, 1996, is unpublished and appears as *Appendix A* to this Petition[1]. The Order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, filed on September 10, 1996, appears as *Appendix C* to this Petition. The unpublished written opinion of the District Court of Oregon, filed on May 18, 1995, appears as *Appendix D*[2].

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254(1). The Ninth Circuit's decision in this matter was filed on July 31, 1996. A timely Petition for Rehearing and Suggestion for the Appropriateness for Rehearing En Banc was filed on August 14, 1996. The Ninth Circuit's Order denying the Petition for Rehearing

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[1] The transcript of the "oral argument" in the Ninth Circuit on July 8, 1996 is *Appendix B* to this Petition.

[2] The transcript of the "telephonic oral argument" in the District Court on May 8, 1995 is *Appendix E* to the Petition.

and Suggestion for Appropriateness for Rehearing En Banc was filed on September 10, 1996.

CONSTITUTIONAL PROVISIONS

This Petition involves the Fifth and Sixth Amendments of the Constitution of the United States.

The Fifth Amendment provides, in relevant part, as follows:

> **"AMENDMENT V – DUE PROCESS –**
>
> *No person shall be held to answer . . . , nor be deprived of life, liberty, or property, without due process of law;* [Emphasis added.]

The Sixth Amendment provides, in relevant part, as follows:

> **"AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS –**
>
> *In all criminal prosecutions, the accused shall enjoy the right . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,* and *to have the Assistance of Counsel for his defense."* [Emphasis added.]

STATEMENT OF THE CASE

A. INTRODUCTION

1. Entrapment

Petitioner-Louis Juan Diaz's primary, affirmative defense at his jury trial was unlawful entrapment by the government's informant-Maria Flores. The informant had been arrested with nine (9) ounces of cocaine on December 29, 1989. Shortly thereafter, Flores began to

unlawfully induce Petitioner to persuade him to become one of her buyers of cocaine.

As expressed in the Ninth Circuit Model Jury Instruction "§ 6.02 ENTRAPMENT: The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. The government must prove the following:

1. the defendant was predisposed to commit the crime before being contacted by government agents, and

2. the *defendant was not induced* by the government agents to commit the crime." [Emphasis added.]

Further, as expressed in Devitt, Blackmar and O'Malley's Federal Jury Instructions, "§ 19.04 ENTRAPMENT – EXPLAINED: The Defendant ___ asserts that (he) (she) was entrapped by the government to commit the crime of ___ that is alleged in (Count ___ of) the indictment. A defendant may not be convicted of this crime, however, if that person was entrapped by the government to do the acts charged. . . .

In determining the question of entrapment, the jury should consider all of the evidence received in this case concerning the intentions and disposition of the defendant before encountering the law enforcement officers (or their agents) as well as *the nature and the degree of the inducement or persuasion* provided by the law enforcement officers (or their agents)." [Emphasis added.]

2. Trial Testimony

Petitioner offered evidence that *but for* the informant-Maria Flores and agents repeated (in excess of 30 communications) and unlawful inducements and entrapment, that he would not have been involved in the charged offense. Petitioner had been gainfully employed for over ten (10) years at U.S. West [the local telephone company],

was engaged to and married Lori Wetter in February 1990, had been honorably discharged from the United States Marine Corp, and had never been arrested or convicted of any felony.

In trial testimony, evidence was presented that the informant-Flores and law enforcement agents initiated in excess of thirty (30) telephone and in-person communications with Petitioner to euchre, persuade and induce him to engage in an attempted cocaine purchase. These 30+ telephone calls and contacts started in early January 1990 and finally concluded, six (6) months later, on June 15, 1990.

In trial testimony, Petitioner testified that from early January 1990 informant-Flores had initiated and contacted him, both in person and on the telephone, numerous times, *supra*, to improperly persuade and entice him to buy cocaine from her. Petitioner repeatedly stated he did not want to get involved.

After multiple pleas, inducements and promises during the month of January 1990 and the first two (2) weeks of February 1990, Petitioner reluctantly assented that he would help her to try to find someone to buy one kilogram of cocaine from informant-Flores.

Flores repeatedly pled with Petitioner to help her and her family; that she was desperate for someone to help her; that she would lose her family's home; that she needed to find someone to buy cocaine from her or her source, "Rena"; and that she needed Petitioner to help her by telling Flores' source that Petitioner would be willing to buy cocaine.

After Petitioner reluctantly assented to help out informant-Flores, it took another four (4) months for Petitioner to try to find someone who had the money for the purchase. By June 15, 1990, some six (6) months after informant-Flores began entrapping Petitioner, Petitioner had found Donald Burke, who had half of the money for

the purchase. Burke, waiting at a nearby park, gave the $9,000.00 to Petitioner. Petitioner brought the money to the meeting place and was arrested by the agents for the *attempted* purchase of cocaine.

Searches of Petitioner's property and vehicle did not reveal one corroborating factor whatsoever relating to cocaine/drug activities, including but not limited to pay-and-owe sheets, scales for measuring, packaging materials for distribution, nor any sum of money or property directly or indirectly associated with illicit activities.

On the other hand, informant-Flores testified at Petitioner's trial that Petitioner had been the person initiating the contacts between them and that it was Petitioner who wanted to buy cocaine from her. Flores falsely testified to the jury about a number of factors, which included, but is not limited to: [1] her extensive involvement with cocaine trafficking, [2] that she had not approached the government seeking "case consideration" for her pending 9 ounce cocaine trafficking arrest, and [3] that there was no agreement with the government regarding her cooperating and testifying for them.

Based upon Petitioner's trial counsel's inability to effectively impeach informant-Flores, the jury found Petitioner guilty of attempting to purchase a kilogram of cocaine.

3. Newly Discovered Reports

Some four (4) years after Petitioner's conviction and incarceration, *twelve (12) previously undisclosed agent's reports* were *discovered* . . . which included a transcript of a tape-recorded confession and a cooperation agreement between informant-Flores and the government.

At the time of the discovery of these reports, Petitioner was appealing the denial of his original habeas corpus petition [28 U.S.C. § 2255], which was primarily based upon

ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, *inter alia*, and issues related to *Brady v. Maryland* violations.

These 12 reports included *evidence* of a *cooperation-agreement* entitled "SPECIAL CONSENT FORM" [*Appendix H* to this Petition], a tape-recorded confession [*Appendix I* to this Petition] and Clackamas County Special Report [*Appendix G* to this Petition]. All of which *diametrically contradicted the trial testimony* of the informant-Flores and government agents at Petitioner's trial.

The false and contradictory nature of the trial testimony, as compared to information within these Appendices, was known to the trial prosecutor as acknowledged by her in *Appendix J* to this Petition.

The heart of Petitioner's defense was that he was unlawfully entrapped by the government's informant-Maria Flores. On the issue of improper/illegal government inducements, to wit, entrapment by informant-Flores, it was the credibility of informant-Flores juxtaposed against the credibility of Petitioner.

Without the ability to *effectively* cross-examine the informant and agents, the cross-examination of the government's witnesses was rendered "ineffective".

B. 1994 DISCOVERY OF 12 UNDISCLOSED REPORTS

On July 25, 1994, following the district court's denial of Petitioner's original 28 U.S.C. § 2255 motion, and while the matter was pending on appeal, Petitioner's counsel learned from a defense attorney by the name of DANIEL FEINER, ESQ., who was representing an unrelated defendant in *United States v. Bracamontes, et al.*, Case No. CR 92-400(FR), which had been filed in the District of Oregon, that the informant in his *Bracamontes'* case, using the name of "Mary Quevas", was the very same informant in Petitioner's case, "Maria Flores."

On July 28, 1994, Bracamontes' attorney transmitted material to Petitioner's counsel, including a May 1994 interview between Mary Quevas [aka Maria Flores] and Special Agent Ruben Vela and Postal Inspector P. Groza, Jr. Subsequently, Petitioner's counsel submitted the newly discovered documents in support of his motion for limited remand to the Ninth Circuit Court of Appeals.

In the later part of December of 1994 and January 1995, Petitioner's counsel herein received some twelve (12) additional Clackamas County Sheriff's reports, documents and at least two transcripts of pretrial proceedings (from the *Bracamontes* prosecution which occurred in October of 1994).

Petitioner's counsel filed and annexed the 12 newly discovered documents as *"Exhibit Supplemental No. 4"* in support of his motion requesting the district court's willingness to consider said newly discovered evidence. While the request was pending in the district court, the Ninth Circuit remanded the cause to the district court for reconsideration of the district court's original rulings on the § 2255 motions, in light of the 12 recently discovered documents.

Thereafter, Petitioner's counsel filed a supplemental motion in support of the habeas corpus petition and motion to dismiss the indictment based upon "outrageous governmental misconduct".

Petitioner's trial-level counsel . . . [Mr. Blackman (*Appendix K* to this Petition) and Mr. Uhle (*Appendix L* to this Petition)] . . . filed affidavits averring that they had just reviewed the twelve (12) newly discovered documents and reports in *"Exhibit Supplement No. 4"* and had never previously seen, nor reviewed them; nor had they been tendered and/or advised of their availability by the government [*Appendix K and Appendix L*, respectively].

C. DISPOSITION IN THE DISTRICT COURT RELEVANT TO THIS PETITION.

1. Trial Court Proceedings.

Indictment/Pre-trial Discovery/Trial/Sentencing: On July 11, 1990, the grand jury returned a one count indictment charging Petitioner with *attempting* to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) on June 15, 1990. [Emphasis added.] *Pre-trial Discovery Motions and Proceedings*: Trial-level counsel, Mr. Blackman and Mr. Uhle, had filed, subpoenaed and/or requested pretrial discovery requests and motions. The government filed its responses and willingness to comply with its *Brady* obligations, which included representations of complete compliance with *Brady, inter alia. Trial and Sentencing*: On March 15, 1991, the jury returned a verdict of guilty and the Petitioner was remanded into custody. On May 30, 1991, Petitioner was sentenced to 109 months in the custody of the Attorney General, 48 months of supervised release, and $2,400 fine plus special penalty assessment. Petitioner remains incarcerated at the Federal Correctional Institution at Sheridan, Oregon at this time.

2. Post-Conviction Motions.[3]

Motion for New Trial: On May 21, 1993, Petitioner filed his motion for new trial pursuant to FRCrP, Rule 33. Without argument and/or an evidentiary hearing, the motion for new trial was denied on September 17, 1993. *Motion pursuant to 28 U.S.C. § 2255:*[4] On October 6, 1993,

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[3] Every Post-Conviction Motion was denied [a] without an evidentiary hearing and [b] without any in-court oral argument. All references to the Federal Rules of Criminal Procedure shall be referred to as "FRCrP". All references to the Federal Rules of Appellate Procedure shall be referred to as "FRAP".

[4] Hereinafter referred to as a "§ 2255 Motion".

Petitioner filed his original § 2255 Motion and requested, inter alia, [1] an evidentiary hearing and/or [2] oral argument thereon. Expert-Witness affidavits were filed by University of Southern California Law Center Professor, Charles D. Weisselberg and experienced federal trial attorney, Richard C. Chier. Both such experts reviewed the entire record and concluded, independently of each other, that gross violations of the *Brady* doctrine, as well as ineffectiveness of trial-level counsel, had occurred in Petitioner's case. The cumulative effect of which denied the Petitioner "due process". The district court refused to grant the requested [1] evidentiary hearing, [2] any oral argument and [3] on January 26, 1994 denied the original § 2255 motion without any hearing whatsoever thereon.

Motion for Discovery [Rule 6 of Title 28 U.S.C. § 2255]: On October 6, 1993, Petitioner also filed his § 2255 Motion's Rule 6 Motion for Discovery and requested [1] an evidentiary hearing and/or [2] oral argument thereon.[5] The district court refused to grant the requested [1] evidentiary hearing, [2] any oral argument and [3] on January 26, 1994 denied the Rule 6, § 2255 discovery motion without any hearing thereon.

Motion for Expansion [Rule 7 of Title 28 U.S.C. § 2255]: On October 6, 1993, Petitioner concurrently filed his

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[5] The "Rule 6" Motion for Discovery was very specific. It sought to take the depositions of relevant, percipient witnesses so as not to take up a lengthy amount of courtroom hearing time. The specific witnesses addressed in the motion were: defense attorneys Blackman and Uhle, Mrs. Dehnman [Mr. Uhle's secretary and witness to the "coaching" of Maria Flores], Ron Oberg [the Clackamas Review reporter, present during the arrest and search of defendant and his van on June 15, 1990], Teresa Gustafson, the Clackamas County prosecutor present at Maria Flores' plea on March 13, 1991, and attorney-Bernstein suggested by Judge Bagley to assist Maria Flores at her plea.

§ 2255 Motion's Rule 7 Motion for Expansion and requested [1] an evidentiary hearing and/or [2] oral argument thereon.[6] The district court refused to grant the requested [a] evidentiary hearing, [b] any oral argument and [c] on January 26, 1994 denied the Rule 7, § 2255 expansion motion without any hearing thereon.

Supplemental Motion In Support of § 2255 Motion: After the remand order from the Ninth Circuit, on March 10, 1995, Petitioner filed a Supplemental Motion In Support Of His Habeas Corpus Petition, and Motion to Dismiss Based Upon Outrageous Governmental Misconduct, *inter alia*. The government responded and Petitioner replied to the government's response.

On May 8, 1995 a telephonic oral argument was heard in the District Court. [A transcript of this oral argument is *Appendix E* to this Petition]. On May 18, 1995, the district court denied Petitioner's habeas corpus [§ 2255 petition], denied his motion to dismiss for outrageous governmental misconduct [*Appendix D* to this Petition], and denied his request for an evidentiary hearing.

Nowhere in the district court's opinion [*Appendix D* hereto] did the court refer to and mention in any way this Court's *Kyles v. Whitley* decision. Counsel for Petitioner had vigorously, purposefully and directly argued the significant impact of the Supreme Court's *Kyles* opinion and described its relevance to the § 2255 Diaz Petition to the trial court. [*Appendix E*] Nonetheless, the trial court ignored this United States Supreme Court's most recent, comprehensive decision relating to *Brady* violations.

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[6] This "Rule 7" Motion for Expansion was equally very specific. It sought the expansion of the record to include already existing and specifically described the documents, records and photographs.

Petitioner thereafter timely filed his Notice of Appeal on May 26, 1995. The matter was briefed and an oral argument was calendared and heard on July 8, 1996. [The transcript of the oral argument in the Ninth Circuit is *Appendix B* to this Petition.] The Court of Appeals issued its *unpublished* decision on July 31, 1996. Petitioner filed his petition for rehearing, which was denied on September 10, 1996.

Again, counsel for Petitioner had vigorously, purposefully and directly argued the significant impact of the *Kyles* decision and described its relevance to the Diaz § 2255 Petition to the Ninth Circuit. Nowhere in the Ninth Circuit's Memorandum decision [*Appendix A*] did that court refer to and/or mention in any way the Supreme Court's decision in *Kyles v. Whitley*. The Ninth Circuit intentionally disregarded and ignored this United States Supreme Court's most recent and relevant decision on *Brady* violations and related issues.

REASONS FOR GRANTING WRIT

The Petitioner contends the Ninth Circuit Court of Appeals has decided a federal question in a way that [a] directly conflicts with and [b] purposefully ignores applicable decisions of this Court.

Further, Petitioner contends that the Ninth Circuit has an "unwritten policy", which denies appealing parties, both "procedural" and "substantive" due process. That policy is that a Petition for Rehearing and/or Suggestion for Rehearing En Banc will never be granted in an "unpublished" decision . . . whether the decision grossly misstates the law and/or blatantly mischaracterizes the facts.

The basis for the policy is that since an "unpublished" decision can never be cited as authority, and, of course, cannot thereby conflict with published

opinions from the Ninth Circuit or any other circuit, the Ninth Circuit *never* grants rehearing to "unpublished" decisions.

The exercise of this disturbing and errant policy occurs notwithstanding egregious misstatements of law and fact . . . as in Petitioner's case . . . where, in the instant case, the Ninth Circuit made thirteen (13) misstatements of fact which directly conflicted with the actual record . . . and, additionally, where the Ninth Circuit made four (4) primary misstatements and "errors of law".

SUMMARY OF ARGUMENT

In *United States v. Bagley*, 473 U.S. 667 (1985), this Court reaffirmed and clarified the constitutional obligations of the prosecutor to correct false evidence and to reveal exculpatory and impeaching evidence to the defense. This obligation has two aspects.

First, a prosecutor may not affirmatively present evidence that the prosecutor knows or should know is false or misleading, and must correct any such evidence when it appears. Because of the strong potential that false or misleading evidence has for corrupting the truth-seeking function of a trial, the test is exacting. A defendant is entitled to a new trial unless the false evidence is shown beyond a reasonable doubt to be harmless. Any lesser standard would put a premium on prosecutorial concealment of perjury until after a conviction is final.

Second, a prosecutor is obligated to disclose any evidence that is favorable or exculpatory to the defense, i.e., evidence that can discredit the government's case or evidence that may tend to exonerate the defendant. Evidence is material if there is a reasonable probability that it would change the verdict. A reasonable probability is one that undermines confidence in the outcome.

In this case, the prosecution violated both aspects of the rule. We begin with the second aspect because the wealth of suppressed evidence undercuts the government's entire case.

The amount and flagrancy of the undisclosed exculpatory and impeaching evidence is shocking. Twelve reports, including the tape-recorded confession of informant-Flores taken shortly after her arrest, involve discrepancies that are sufficient to cast grave doubt upon the integrity of all of Flores' testimony and the government's case.

Petitioner's affirmative case posits that the evidence also revealed the extent and unwholesome nature of the informer's interactions with government agents and prosecutor.

In post-conviction proceedings, the trial prosecutor conceded that some of the suppressed information might have been harmful to the government's case [*Appendix F*].

Even more was suppressed. For example, a report of the Clackamas County Sheriff, dated February 1, 1990, demonstrated that the informant-Flores sought "case consideration" in exchange for her cooperating with the government herein. This report directly contradicted the trial testimony of informant-Flores and the government agents. The informer's undisclosed statements were suppressed both before and after testifying.

The effect on the government's case is global. The dispositive question is whether the entire lot of suppressed information undermines confidence in the verdict.

The following argument demonstrates that it does. The informant and the government agents were impeachable with the concealed evidence. The nature of the entire investigation becomes questionable once the unsavory relations between the authorities and the informer are revealed. The concealed evidence against the informant actually makes out a strong case that she entrapped and

framed Petitioner. Confidence in the verdict cannot be sustained in this light.

The prosecution also presented the jury with evidence they knew to be false. The prosecution elicited testimony from informant-Flores and government agents that is flatly contradicted by her taped-recorded (undisclosed) confession, which was witnessed and signed by government agent Craig Roberts [*Appendix I*]. Prosecution witnesses denied the existence of discrepant confession and cooperation agreements with informant-Flores, yet presented spurious testimonial evidence to the contrary. The prosecution's sponsorship of uncorrected, false evidence cannot be found harmless on this record. Reversal is required.

ARGUMENT

– I –

THE PROSECUTION HAS A DUTY TO DISCLOSE EVIDENCE THAT IS FAVORABLE AND EXCULPATORY TO THE DEFENSE, AND MUST ASSURE THAT THE PRESENTATION OF FALSE EVIDENCE AT TRIAL IS BROUGHT TO THE ATTENTION OF THE DEFENSE

In the 30 years after *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam), the Court identified an important class of due process rights now commonly referred to as the *Brady* doctrine from *Brady v. Maryland*. Through this series of cases, the Court has uniformly condemned the prosecution's presentation of evidence that is false, that is known to create a false impression and the suppression of evidence that is favorable or exculpatory to the defense.

The *Mooney* Court recognized that due process is violated when "a state has contrived a conviction . . . through a deliberate deception of court and jury by the presentation of testimony known to be perjured." 294 U.S. at 112. Less than ten years later, the Court held

that the same principle extended beyond the presentation of false evidence to include the prosecution's "suppression . . . of evidence favorable to" a defendant. *Pyle v. Kansas*, 317 U.S. 213, 216 (1942).

In *Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam), the prosecution suppressed information which would have "impeach[ed the state's witness'] credibility," and could have "corroborate[d] the Petitioner's contention." 355 U.S. at 31. The Court held that the prosecution's presentation of evidence that creates a "false impression" and the suppression of evidence that "corroborates" the defendant's theory of defense violates due process under the principles enunciated in *Mooney* and *Pyle*. *Id.*

In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court held that there is no difference between false evidence offered by the government and false evidence that goes "uncorrected when it appears," 360 U.S. at 268. The Court accordingly held that the rule of *Mooney*:

> "that a State may not knowingly use false evidence, including false testimony, . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.* at 269.

In the landmark case of *Brady v. Maryland*, 373 U.S. 83 (1963), the Court framed the holdings of the above cases into a general principle. The Court again noted the prosecution's obligation to disclose any evidence in its possession that is favorable to the defense or that may "tend to exculpate [the defendant] or reduce the penalty." *Id.* at 88.

Brady held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady, supra,* 373 U.S. at 87 (emphasis added).

The Brady rule is quintessentially truth-seeking. An individual's right to a fair trial requires that the false or suppressed evidence be disclosed so that a defendant is assured "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' " *Crane v. Kentucky,* 476 U.S. 683, 690-91 (1986) quoting *United States v. Cronic,* 466 U.S. 648, 656 (1984). The truth-seeking policy underlying the Brady doctrine mandates that it encompass two situations: the prosecution's offer of evidence that it knew or should have known to be false and the prosecution's suppression of evidence favorable to the defense. Because each type of prosecutorial misconduct perverts and "corrupt[s] . . . the truth-seeking function of the trial process," *United States v. Agurs,* 427 U.S. 97, 104 (1976), the Court has uniformly and adamantly denounced both.

– II –

ERRORS OF LAW

A. *KYLES V. WHITLEY* HOLDS THAT THE PROSECUTION HAS A DUTY TO LEARN OF FAVORABLE EVIDENCE IN THE HANDS OF THE POLICE ASSISTING IN THE CASE AND THAT THE SUPPRESSED EVIDENCE IS TO BE ASSESSED CUMULATIVELY TO DETERMINE IF IT UNDERMINES CONFIDENCE IN THE TRIAL'S OUTCOME.

The Ninth Circuit's statement in its decision [*Appendix A*] . . . that the Government has no obligation to

produce information which it does not possess or of which it is unaware . . . is contrary to the law of the Ninth Circuit and the Supreme Court.

This principle of law is not only not supported in its entirety by the Ninth Circuit's published opinion in *United States v. Bryan*, 868 F.2d 1032 (9th Cir.) *cert. denied* 493 U.S. 858 (1989) . . . but it is also expressly refuted by the Supreme Court's recent decision in *Kyles v. Whitley, supra*, that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 115 S.Ct. at 1567-68.

In *Kyles, supra*, the Supreme Court rejected the argument of the government that with respect to evidence not disclosed to the prosecutor until after the trial, it should not be held accountable under *Bagley* and *Brady* for evidence known only to the police investigators and not to the prosecutor. *Id.*

In Petitioner's case, as set forth in the affidavit of Special Assistant United States Attorney Jennifer Martin, dated March 16, 1995 [*Appendix J*], the Government was not only aware of Ms. Flores' arrest but was also aware that she had given a statement to Detective Roberts [*Appendix I*].

In SAUSA Martin's affidavit [*Appendix J*, page 2], Martin stated: "Both parties were aware . . . that she was *interviewed* by Detective Roberts after her arrest . . . " [Emphasis added]. SAUSA Martin later adopted her affidavit and expanded on her knowledge at the oral argument in the Ninth Circuit [*Appendix B*].[7]

---

[7] "JUDGE: If I understand counsel's argument correctly, what he's saying that your office knew about them, knew that they were in the hands of the Clackamus County sheriff's office but did not arrange to have them delivered to you.

Accordingly, the Government had the duty under *Bagley* and *Brady* to learn of the impeachment information contained in Flores' statement as well as the other *Brady* information in the Clackamas County Sheriff's Office and to provide that information to the defense.

Next, under *Kyles*, a reasonable possibility that the result would be different . . . is not that the jury would have necessarily acquitted Petitioner, . . . but whether the *cumulative impact* of all the undisclosed *Brady* would reasonably undermine confidence in the outcome of the trial.

> In other words, as I understand his arguments, in spite of the subpoena or what the defendant may or may not have known, you knew and you didn't arrange to turn them over and the *Brady* material was critical to his case.
>
> MARTIN: Your Honor, my recollection is set forth in my affidavit.
>
> * * *
>
> My best recollection, I don't recall which of the two defense counsels' office I called . . . *But the court is correct, my office did not go to the Clackamus County District Attorney's office and obtain those reports, frankly, ever.* [Emphasis added].
>
> * * *
>
> JUDGE: My question was where did you put in the record the fact that you had told defense counsel, whichever counsel that was, that these records were available in Clackamus County?
>
> MARTIN: Your Honor, that would be in the affidavit to which counsel was referring . . . "
>
> [*Transcript of July 8, 1996 oral argument, Appendix B*, pages 11-13, to this Petition.]

Therefore, the Ninth Circuit's erroneous emphasis in Petitioner's matter on whether the outcome would have been different is an incomplete formulation of the *Bagley/ Brady* standard of materiality.

As the Ninth Circuit recently stated in *United States v. Sarno*, 73 F.3d 1470, 1504-05 (9th Cir. 1996):

> "The law governing the disclosure by the prosecution of evidence beneficial to a defendant is well-settled. The suppression by the government of material favorable evidence violates due process and requires that the tainted conviction be vacated. [Citations] . . . Suppressed evidence is held to be material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " [Citations.] "A 'reasonable probability' of a different result is . . . shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " Kyles, ___ U.S. at ___, 115 S.Ct. at 1566 (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381). We determine the existence of a "reasonable probability" based upon the cumulative impact of all the evidence suppressed in violation of *Brady*. See *Kyles*, ___ U.S. at ___ - ___, 115 S.Ct. at 1567-69." [Emphasis added.]

See also United States v. Hays, 85 F.3d 1492 (11th Cir. 1996).

In Petitioner's case *sub judice*, the Ninth Circuit did not assess the cumulative impact of the withheld evidence. If the defense had been provided the fourteen (14) reports to cross-examine and impeach the chief government witness, Maria Flores, whose testimony was the only testimony that purported to rebut Petitioner's entrapment [unlawful inducements] defense. As noted above, entrapment was the heart of Petitioner's defense and Flores' credibility was clearly the paramount issue to the defense insofar as her uncorroborated testimony

sought to prove that Flores had not repeatedly and unlawfully induced Petitioner herein.

In reversing the judgment of conviction in *Kyles*, this Court observed:

> "In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles' friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officers, *would have made the defense's case* more *plausible* and *reduced its vulnerability to credibility attack.*" (*Id.* at 1573, footnote 19) (emphasis added.)

B. CONFLICTING AUTHORITY

The Ninth Circuit's holding in Petitioner's appeal . . . that an evidentiary hearing is not required if the district court has given a Petitioner's claim consideration . . . overlooks and conflicts with other decisions of the Ninth Circuit which were not addressed in the Memorandum decision and which hold that *an evidentiary hearing is mandatory* whenever the record does not affirmatively manifest the factual or legal invalidity of the Petitioner's claims. *United States v. Popoola*, 881 F.2d 811, 812 (9th Cir. 1989) and *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982).

Further, the specific language of § 2255 requires that "[u]nless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the Court shall . . . grant a prompt hearing . . . ,

determine the issues and make findings of fact and conclusions of law"; and the holdings of analogous habeas cases that an evidentiary hearing is required if the Petitioner alleges facts that, if proved, would entitle him to relief and an evidentiary hearing is required to establish the truth of the allegations: *Harris v. Pulley*, 892 F.2d 1546, 1565 (9th Cir. 1988) and *Pierce v. Cardwell*, 572 F.2d 1339, 1340-41 (9th Cir. 1978).

The Ninth Circuit's erroneous statement that Petitioner did not allege that the district court failed to give careful consideration to the § 2255 motion and related discovery motions overlooked and was in conflict with other decisions of the Ninth Circuit which were similarly ignored and/or not addressed in the Memorandum decision.

On the contrary, these other decisions, *supra*, hold that the Petitioner need make specific factual allegations which, if true, would entitle him to the relief an evidentiary hearing, inter alia. *Baumann v. United States, supra*, 692 F.2d at 571 and *United States v. Hearst*, 638 F.2d 1190, 1194-95 (9th Cir.1980), *cert. denied*, 451 U.S. 938.

It is clearly improper that Petitioner could be denied relief under § 2255 simply because the district court purportedly gave careful, *albeit erroneous*, consideration to his § 2255 motion.

In addition, the Ninth Circuit made a complete misstatement of law . . . when it stated that the Government has no obligation to produce information which it does not possess or of which it is unaware, . . . overlooked and conflicted with the decision of the United States Supreme Court in *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), *inter alia* which peculiarly was not addressed in the Memorandum decision. The Supreme Court expressly rejected the very same government argument in *Kyles*.

Kyles decided that, with respect to evidence purportedly not disclosed to the prosecutor until after the trial, that the prosecutor must be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. *Kyles* further held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 115 S.Ct. at 1567-68.

Further, the Ninth Circuit's holding . . . that Petitioner's allegation that the Government knowingly presented false testimony or failed to correct what the prosecutor knew was false testimony in violation of *Mooney v. Holohan*, 294 U.S. 103 (1935), requires that Petitioner must show that the Government's conduct was "so grossly shocking and so outrageous as to violate the universal sense of justice" . . . conflicts with and overlooks numerous Supreme Court decisions which were not addressed in the Memorandum decision.

These Supreme Court decisions hold that the falsehood is deemed to be material and a corruption of the truth-seeking function of the trial requiring the conviction to be reversed "if there is *any reasonable likelihood* that the false testimony *could have affected the judgment of the jury.*" [Emphasis added.] *United States v. Agurs*, 427 U.S. 97, 103; *accord, Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 271. Moreover, the Court has noted that the *Napue/Giglio* materiality standard is equivalent to the *Chapman v. California*, 368 U.S. 18, 24 (1967), "harmless beyond a reasonable doubt" standard. *See United States v. Bagley*, 473 U.S. 667, 679 n. 9.

C. UNDER SETTLED LAW, PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING ON THE DISPUTED FACTUAL ALLEGATIONS . . . THAT STILL REMAIN UNRESOLVED.

The Ninth Circuit began its Memorandum decision with the statement that "[s]ection 2255 requires only that the district court give a claim ' "careful consideration and preliminary processing, including full opportunity for presentation of the relevant facts." ' " *Watts*, [sic] 841 F.2d at 277 [sic], quoting *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977). Slip Opinion p. 1.

The Ninth Circuit, however, left out the next paragraph in *Watts v. United States*, 841 F.2d 275, 277 (9th Cir. 1988), that clearly distinguishes *Watts* from the present case:

> "Although we recognize that '[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive,' *Blackledge*, 431 U.S. at 82 n.25, we find that this is one of those cases in which an issue of credibility may be conclusively decided on the basis of documentary testimony and evidence in the record."

The *Watts* court found that it was impossible to believe that if Watts had thought he was to receive a sentence of no more than 20 years rather than the life sentence he was given, and that his wife would go free rather than being sentenced to ten years as she was, he would not have mentioned this obviously relevant inconsistency in his Rule 35 motion and in his correspondence with Judge Duenas. Thus, "Watts' earlier silence refutes his present allegations." *Id.* at 278.

As set forth in Petitioner's Reply Brief [*Appendix N*] herein, there were at least three major, unresolved material factual conflicts; the *first* was based on the affidavits of the prosecutor and the two defense attorneys [*Appendix*

N, page 8]; the *second* was based upon the conflicting affidavits of Deputy District Attorney Terese Gustafson and Clackamas County Sergeant Randy Barry [*Appendix N*, page 10]; and, the *third* was whether the prosecution knowingly presented false testimony and/or permitted the false testimony to be presented to the jury without correction [*Appendix N*, page 13].

It is well settled that when a Petitioner alleges facts that would entitle him to relief and a hearing is required to establish the truth of the disputed allegations, an evidentiary hearing is required. *See Harris v. Pulley, supra*, 829 F.2d at 1565 and *Pierce v. Cardwell, supra*, 572 F.2d at 1340-41.[8]

Quoting *Baumann v. United States*, 692 F.2d 565, 671 (9th Cir. 1982), this court in *United States v. Popoola, supra*, 881 F.2d at 812, stated that "an evidentiary hearing is mandatory when the record does not affirmatively manifest the factual or legal invalidity of the Petitioner's claim." In *Baumann*, the Petitioner contended, *inter alia*, that the district judge erred in failing to order an evidentiary hearing on his claims of newly discovered evidence and prosecutorial suppression of *Brady* material. *Baumann, supra* at 568. The *Baumann* Court stated:

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[8] Although, *Harris* and *Pierce* are habeas cases, the advisory committee note to Rule 8 of the Rules Governing Section 2255 Proceedings states:

> "The standards for a section 2255 hearings are essentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact-finding proceeding is in issue rather than the state's. Also section 2255 does not set specific time limits for holding the hearing, as does section 2243 for a habeas action. With these minor differences in mind, see the Advisory Committee Note to Rule 8 of Section 2254 Rules, which is applicable to Rule 8 of the Section 2255 Rules."

> "Section 2255 expressly provides that an evidentiary hearing 'shall' be granted '[u]nless the motion and the files and records of the case *conclusively* show *that the prisoner is entitled to no relief.*' 28 U.S.C. § 2255 (emphasis per report). Obviously, a hearing is not automatically required on every section 2255 petition. [Citation.] Nonetheless, a hearing is mandatory whenever the record does not affirmatively manifest the factual or legal invalidity of the Petitioner's claims. [Citation.] Mere conclusionary statements by petitioner do not justify a hearing. [Citation.] *On the other hand, the petitioner need not detail his evidence, but must only make specific factual allegations which, if true, would entitle him to relief. [Citations.] A hearing must be ordered unless, viewing the petition against the record, its allegations do not state a claim for relief or are so palpably incredible or so patently frivolous or false as to warrant summary dismissal.* [Citations.]" [Emphasis added]

Here, there are disputed factual issues with respect to conflicting affidavits and credibility is certainly an issue in resolving them. As noted by the Supreme Court in *Blackledge*, "when the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive." *Id.*, 431 U.S. at 82 n.25.

The instant case is not one of the rare cases as in *Watts*, where credibility can be resolved based on their implausibility. Moreover, the statement quoted in *Watts* from *Blackledge* was made in the context of the Court stating that the district judge may avoid the need for an evidentiary hearing by utilizing Rule 6 to obtain discovery before an evidentiary hearing which may show that such a hearing was unnecessary or under Rule 7 the judge can direct expansion of the record to include appropriate materials that enable the judge to dispose of the

petition without the time and expense required for an evidentiary hearing. *Blackledge, supra* at 81-82.[9] [Please see the affidavit of University of Southern California, School of Law, Professor Charles D. Weisselberg, *Appendix M* to the Petition.]

In the present case, however, the district court denied both Petitioner's motions under Rule 6 for discovery and his request to expand the record under Rule 7. In *Blackledge*, the Supreme Court concluded that since Allison was entitled to a full opportunity for presentation of the relevant facts, the Court affirmed the judgment of the Court of Appeals which had remanded the case back to the district court for an evidentiary hearing. *Id.* at 71, 83.

In this case, Petitioner was not only denied his opportunity to establish the truth of his allegations at an evidentiary hearing but also to obtain discovery and expand the record.

Thus, "careful consideration" is not the touchstone for section 2255 proceedings but it is whether the petitioner had a full opportunity for the presentation of relevant facts. While a district court must give a Petitioner's claim "careful consideration," it cannot also deny a Petitioner a full opportunity to present the relevant facts . . . as the district court did in Petitioner's case.

---

[9] The syllabus to the Court's opinion summarized the Court's observations as follows:

> "(d) Though through such procedures as summary judgment, discovery, or expansion of the record, it may develop that a full evidentiary hearing is not required, respondent is 'entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts.' *Harris v. Nelson*, 394 U.S. 286, 298." *Id* 431 U.S. at 64.

D. THE PRESENTATION OF FALSE TESTIMONY BY THE GOVERNMENT IS REVIEWED UNDER THE *NAPUE/GIGLIO* AND *CHAPMAN* HARMLESS-BEYOND-A REASONABLE-DOUBT STANDARD.

The Ninth Circuit stated that with respect to Petitioner's allegation regarding the presentation of false testimony or the Government's failure to correct what the prosecutor knew was false testimony [in violation of the *Mooney* doctrine], Petitioner must show that the Government's conduct was "so grossly shocking and so outrageous as to violate the universal sense of justice." Slip Opinion, p.4.

The cases cited by the Ninth Circuit[10] to support this standard are totally inapposite to the instant matter . . . in that they deal with the typical outrageous governmental misconduct cases that allege that the Government manufactured the crime [*McClellan*] or improperly used an informant [*Smith*]. They do not address the presentation of perjurious testimony which corrupts the truth-seeking function of the trial. This Court in *Agurs, supra,* stated that harmless error review is justified on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id.* at 104; *Bagley, supra* at 679.

The standard for judging the presentation of testimony known to be perjurious by the Government has been well-established for many years. *See United States v. Agurs, supra,* 427 U.S. at 103 ("a conviction obtained by the knowing use of perjured testimony is fundamentally

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[10] *United States v. McClellan* 72 F.3d 717, 721 (9th Cir. 1995), *cert. den.*, ___ U.S. ___, 116 S.Ct. 1440 (1996) and *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991).

unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury."); accord, *Giglio v. United States, supra*, 405 U.S. at 154; *Napue v. Illinois, supra*, 360 U.S. at 271. *See Bagley, supra* at 678-680 & n. 8 (discussing *Mooney, Agurs, Giglio* and *Napue*).

In *United States v. Bagley, supra*, this Court noted that the *Napue/Giglio* materiality standard was the equivalent to the *Chapman v. California* "harmless beyond a reasonable doubt" standard. *Id.* at fn. 9.

Lastly, as a disturbing aside, it appears that a summer law clerk must have written the Ninth Circuit's Memorandum decision and was merely cutting and pasting portions from a resource or resources unrelated to the Petitioner's matter. On the last page of Petitioner's Memorandum decision a reference is made to the *Farrow* decision. It is painfully clear that this was and is not an issue in this matter.

Years of thoughtful and detailed investigation, research and presentations were maligned by a Memorandum that was tenuous and erroneous in its legal reasoning, inaccurate in its factual assertions and clearly "intellectually dishonest" in its results.

The Ninth Circuit never discussed the manifest need to settle the material *unresolved* conflicts of fact. In one conflict, the state prosecutor [Gustafson] stated in her sworn affidavit that at the time of the Maria Flores' plea that there was no benefit provided for Flores' cooperation in Petitioner's matter. This statement is directly contradicted by sworn testimony by agent Randy Barry, who testified that Gustafson, in fact, followed his department's recommendation to her in Flores' plea negotiations. [*Appendix N*, pages 10-12.]

Further, the Ninth Circuit failed to address the fact that *the government conceded that it committed Brady error* as

to two (2) of the fourteen undisclosed reports, [*Appendix F*]. Further, the Ninth Circuit also left unresolved the *Kyles* cumulative impact of the twelve (12) other undisclosed reports, which completely contradicted the government's trial testimony, inter alia.

This Court's decision in *Brecht v. Abrahamson*, 507 U.S. ___, 113 S.Ct. 1710 (1993), established a standard for all habeas cases. The five to four decision cannot possibly stand for the proposition that a person convicted of a crime as a result of false testimony, allowed knowingly by the prosecution, must somehow prove that the egregious conduct of the government had a substantial and injurious effect or influence in determining a jury's verdict.

Had the Court wished to overrule *Chapman v. California*, 366 U.S. 18, and the other cases establishing different standards for different circumstances, the Court could have done so specifically. To apply to Petitioner's case a rule not applicable to the rule applied on direct review would be an endorsement of the prosecution's behavior at Petitioner's trial.

Unlike the *Brecht* impropriety, which was obvious when it occurred, Petitioner was not aware of the violations of his constitutional rights until following the direct appeal process. Indeed, the *Brady* violations did not come to light until after the direct appeal procedure was terminated and an appeal was pending relating to post-conviction matters.

CONCLUSION

For the reasons set forth herein, Petitioner prays that this Court grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: December 10, 1996 Respectfully submitted,

SHERMAN M. ELLISON
Attorney for Petitioner
LOUIS JUAN DIAZ

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS JUAN DIAZ, Defendant-Appellant.	No. 95-35724 D.C. Nos. CV-93-1252-FR CR-90-203-FR MEMORANDUM* (Filed Jul. 31, 1996)

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted July 8, 1996
Portland, Oregon

Before: GOODWIN and BRUNETTI, Circuit Judges, and KING,** District Judge.

Louis Juan Diaz appeals from the district court's order denying him relief under 28 U.S.C. § 2255.

Section 2255 requires only that the district court give a claim " 'careful consideration and plenary processing, including full opportunity for presentation of the relevant

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

facts.' " *Watts*, 841 F.2d at 277, *quoting Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977). We entrust the choice of method to the court's discretion. *Id.*, *citing Marchibroda v. United States*, 368 U.S. 487, 495 (1962). Diaz did not allege that the district court failed to give careful consideration to the § 2255 motion and related discovery motions. The district judge indicated that she reviewed the record and all materials submitted. Therefore, we find that the district judge did not err by not providing a hearing on Diaz's § 2255 motion and related discovery motions.

II.

Diaz argues that the government's failure to provide the "newly discovered evidence" constituted a violation of its duty to disclose exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), as well as outrageous governmental conduct. The evidence consisted of documents from the *United States v. Bracamontes* case, a separate criminal action in which government witness Maria Flores was involved. Those documents were in the possession of the Clackamas County District Attorney's office.

We reject Diaz' argument fo [sic] two reasons. First, Diaz has failed to establish that the government was even aware of the alleged *Brady* material. The government admitted only that it was aware that Flores had been arrested. The government has no obligation to produce information which it does not possess or of which it is unaware. *See United States v. Bryan*, 868 F.2d 1032 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989). Furthermore, Diaz' counsel was also aware of the *Bracamontes* case and had

already issued a subpoena to the Clackamas County District Attorney. Diaz or his attorney never indicated difficulty in obtaining documents from the Clackamas County District Attorney's office. Once the government was made aware of the documents' existence, it made them immediately available to Diaz. The district court therefore correctly found that there was no evidence that the reports were unavailable to Diaz.

Second, a *Brady* violation requires that the information sought is material to the defense. *United States v. Shaffer*, 789 F.2d 682, 687-88 (9th Cir. 1988). The usual standard of materiality is whether "there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 678 (1985) (emphasis added).

A review of the documents confirms the district court's finding that the reports were cumulative to other pretrial discovery materials. The special report dated February 1, 1990, prepared by the Clackamas County Sheriff's Office, includes the same type of information that Flores provided in this case on January 26, 1990. In the February report, Flores mentioned Diaz once, in relation to naming several individuals who were involved in drug trafficking. The transcript from the *Bracamontes* pretrial motions hearing is consistent with Flores' testimony in this case that she did not expect any benefit in exchange for her information. Because this new evidence is consistent with the existing evidence, it does not follow that the outcome would have been different had the evidence been discovered. Thus, the district court correctly found that there was no *Brady* rule violation. Additionally, none

of the evidence directly contradicts the specific charges for which he was convicted. Diaz consequently has not made the required showing of materiality under *Bagley*, 473 U.S. at 682.

III.

Diaz also argues that the government's activity constituted outrageous government conduct, in violation of the Fifth Amendment Due Process Clause.

To prevail on an outrageous government conduct claim, Diaz would have to show that the government conduct was "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. McClellan*, 72 F.3d 717, 721 (9th Cir. 1995) (quotation omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1448 (1996). The allegations that the government suborned perjury from Flores do not reach this level. The record in no way indicates that the government engaged in conduct that would warrant a dismissal on this basis. Diaz therefore did not meet the "extremely high standard" imposed by this claim. *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991).

IV.

Lastly, Diaz argues that he was denied the effective assistance of counsel. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To demonstrate prejudice, Diaz must show that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

Diaz failed to produce sufficient evidence to satisfy the *Strickland* test. Diaz does not demonstrate that he was prejudiced by his counsel's actions or inactions and his conclusory allegations are unsupported. Moreover, it does not "affirmatively appear in the record that the court based its sentence on improper information." *See Farrow v. United States,* 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc). The failure to procure the documents from the Bracamontes case was not so grave as to rebut the presumption that his counsel's conduct fell within the range of reasonable professional conduct. Furthermore, there was no showing of prejudice. The district court properly found that Diaz failed to produce convincing evidence to support the ineffective assistance of counsel claim.

The decision of the district court is **AFFIRMED**.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-35724
CT/AG#: CV-93-01252-HJF

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

LOUIS JUAN DIAZ

Defendant-Appellant

(Filed Sep. 27, 1996)

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered July 31, 1996

APPENDIX B

No. 95-35724

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS JUAN DIAZ,

Petitioner/Appellant,

v.

UNITED STATES OF AMERICA,

Respondent/Appellee.

In the United States Court of Appeals for the Ninth Circuit Before The Honorable Alfred T. Goodwin, Melvin Brunetti and Samuel P. King, Circuit Judges Presiding

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TRANSCRIPT OF ORAL ARGUMENT
July 8, 1996

Sherman M. Ellison, Esq.
Law Offices of Sherman M. Ellison
The Sherman Oaks Galleria
15303 Ventura Boulevard,
9th Floor
Sherman Oaks, California
91403-3110
Telephone: [818] 994-8888

Attorney for Appellant

PORTLAND, OREGON - July 8, 1996 - 1:30 P.M.

JUDGE: You may be seated. We'll take the cases as they are listed on the calendar, in order. The first case, *Stroud*, was submitted on the briefs; the second case, *Carter*, was dismissed; the third case, *Bratten*, was submitted on the briefs.

And the first case we'll hear is *United States of America versus Diaz*, and you may proceed.

ELLISON: Good afternoon, Your Honors.

JUDGE: Good afternoon.

ELLISON: I know this court has reviewed the briefs that have been submitted by both parties. I have, in representing Mr. Diaz, become quite familiar with the record in this case. I have been an attorney for 27 years practicing in these federal courts. This case, Mr. Diaz's case, is the most egregious case of *Brady* violation that I have seen, both in the context of the materials that were withheld from the defendant which included the confessions of Mrs., uh, Ms. Flores, her various arrest reports, in addition the sheer number of the reports - some 12 to 14 reports that had never been disclosed to the defendant or his trial counsel.

This court knows from the record that we were up in the Ninth Circuit, set for oral argument, when we received from other counsel the 12, the first 12 reports that are a part of the excerpt of record in this case, and that we had received two additional reports from the government during the course of the first appellate proceedings in this matter.

JUDGE: As I read the record, the defendant had subpoenaed from the sheriff's, the county sheriff's department, all or some of those records, is that correct? But never obtained them.

ELLISON: That's correct. His attorney subpoenaed – that's Mr. Uhle – subpoenaed them from the Clackamus County Court and, from our experience, one knows that the likelihood of police reports being in the file is not very likely. These weren't received until another attorney by the name of Dan Feiner representing another gentleman subpoenaed Ms. Flores' probation report, file, from the Probation Department and it was within the Probation Department's reports that all of these documents came, but for the two documents that we've marked as items 13 and 14 in our Exhibit of Record.

The impact of this huge *Brady* violation was that this defendant was denied a fair trial, and the direction of the *Brady* violation was that either the government was aware of and purposefully withheld this information from the defendant –

JUDGE: What's the evidence in the record of that? I don't see any evidence specifically. I've read your brief and there's a lot of dialogue in your brief, but what's the evidence that the U.S. Attorney for the government here withheld this evidence?

ELLISON: The March 16th, 1995, affidavit . . . by this prosecutor that's sitting in this courthouse . . . stated to her judge under penalty of perjury – that's the March 16th, 1995, affidavit – that she was aware

of the interview by Ms. Flores where she confessed to testimony completely, diametrically opposed –

JUDGE: Well I know that, but she was aware of it, but in whose possession was this document?

ELLISON: Well it was in the possession of law enforcement.

JUDGE: What law enforcement?

ELLISON: I'm sorry?

JUDGE: What law enforcement?

ELLISON: At this point the ROCN Task Force that was working –

JUDGE: It was not within the federal – it was not within the U.S. Attorney's jurisdiction, is that correct?

ELLISON: Correct. But this is much like *Kyles* or *Hanna* from that standpoint.

JUDGE: Can you give me a case that says that if it's in any other jurisdiction that they have to produce it under *Brady*?

ELLISON: *Kyles v. Whiteley*. Straight out says this. In *Kyles*, the State of Louisiana was saying that their prosecutor didn't know it was in some local law enforcement's office. That some police officers had it and the prosecutor didn't, claimed that the prosecutor didn't have access to it because he didn't know it existed. And this is exactly the issue that *Kyles* dealt with. Again a post-conviction remedy case dealing with *Brady* violations and that's straight out of *Kyles*. And it's also cited in our brief, also cited in *Hanna*.

But what was interesting, Your Honor, is that this prosecutor that we have in this courtroom right here, in my opinion, misled both Judge Frye and, in my opinion, has misled this court by her own affidavit dated March 16th, 1995, where she states that she was aware of this interview where Flores acknowledges her transgressions, including numerous drug deals, etc. She then cites at page 2 of the government's, the appellee's brief, that she was not aware. She herself contradicts herself in her pleading as compared to her own affidavit. Now perhaps she's not contemplating the thoroughness of counsel or the court in reviewing these matters. The impact of withholding *Brady* denied Mr. Diaz both due process – it denied him the effective assistance of counsel.

I'd like to show Your Honors something. We have in this trial, the *Diaz* case, some 653 pages of trial transcript, 653 pages of trial transcript. We have 9-1/2 pages of cross-examination of Maria Flores, the key witness, 9-1/2 pages, and not one question about drug dealing, the number of drug dealings that she had, not one discussion about her involvement with drugs and the cars coming up from California with drugs in it. Not one question about the guns – they found, when they went in and executed the search warrant in Ms. Flores' home, 17 handguns and rifles, including a .45 submachine gun. No question – not one question asked of her in the trial.

JUDGE: There was a confession, a full confession. Three eye witnesses – there was other evidence, isn't that correct, of the guilt? Or are –

ELLISON: Yes.

JUDGE: – you saying there is none?

ELLISON: As to the substantive offense, Your Honor, there was an acknowledgement by Mr. Diaz of the guilt. That is not –

JUDGE: Are you talking –

ELLISON: The heart of the defense was entrapment. How he got involved. So he didn't deny that he was there and three witnesses. This is an entrapment defense. The credibility of Ms. Flores was the critical item to be attacked.

JUDGE: Are you talking now about ineffective assistance of counsel or are you talking about the *Brady* violation?

ELLISON: Both. Because the lawyer was ineffective because he didn't have *Brady*. The government withheld *Brady* and essentially made the lawyer ineffective. Or, if the government is saying that they had access to it and could have obtained it, then these lawyers were ineffective.

JUDGE: [indecipherable]

ELLISON: Here we have – yes, sir.

JUDGE: Could you straighten me out? I thought his counsel subpoenaed the Clackamus County District Attorney for all those files?

ELLISON: That's correct. And what was brought was a file that had a complaint in it and no police reports.

JUDGE: But they had all that other material?

ELLISON: They had – the lawyer?

JUDGE: No, Clackamus.

ELLISON: Clackamus County perhaps had it. Certainly it was in the Clackamus County Probation Department's files, at some point, because that's how Feiner got it. But as the – Mr. Blackman's investigators' affidavit is in the record here. He had gone to Clackamus County numerous times to search Maria Flores' file. No records in that file. Mr. Uhle's investigator went to the Clackamus County and no records were found.

The bottom line is that these twelve reports – let's talk about just the confession itself. In the confession she admits to three drug transactions within a matter of a couple of days. Known to the prosecutor. Yet Ms. Flores gets up on the stand and testifies in front of the jury with the prosecutor there and the agent, Mr. Roberts, there, and says I've only done this one time. I got caught on my first night. There is not one question about guns; there is not one question about pay-and-owe sheets that were found in her house. Not one question about any of the damaging information that could have been presented through cross-examination. As I pointed out. Nine pages –

JUDGE: You keep saying that the government knew what was in the Clackamus County sheriff's office. How do you establish that in the record that we have here that the government knew what was in the Clackamus County sheriff's office?

ELLISON: It's in both our opening brief and our reply brief. And it references the affidavit of this prosecutor that's in this courtroom stating she was aware of the police reports, her arrest report, her interview by Mr. Roberts. And she specifies by Mr. Roberts. That is this

report that completely contradicts her testimony. So her own affidavit is what I'm relying on. I'm not creating something out of whole – but it's her affidavit. And then –

JUDGE: Is that an exhibit in this record?

ELLISON: Yes, it is, Your Honor.

JUDGE: All right.

ELLISON: And I make reference to it, and I can be more specific –

JUDGE: Am I mistaken that the court found that they did not know until they were produced . . .

ELLISON: No. I don't believe –

JUDGE: . . . through the other trial?

ELLISON: I don't believe Judge Frye ever made that finding.

And Judge Frye never resolved the many unresolved conflicts. For example, Your Honor, we have Ms. Martin on the one hand saying, I told these lawyers that they could go to Clackamus and get those, get these reports.

Mr. Blackman, in an affidavit under penalty of perjury, Mr. Uhle, in an affidavit under penalty of perjury, which are exhibits to these pleadings, stated that they were never advised that there were those reports. And Mr. Uhle said, had I had those reports, and had I been aware of those reports, I would have used them to cross-examine.

As it was, it was a placebo cross-examination. It was a meaningless cross-examine. I'd like you to look at these

9 pages, 9-1/2 pages. Meaningless cross-examination of the critical government witness against your entrapment defense. There is not one element in this cross-examination that would have impeached her at all, because impeachment requires you present something to the jury or the trier of fact –

JUDGE: Did the – I'm looking at an excerpt of the affidavit. Apparently Ms. Martin thought both lawyers knew that Flores had been interviewed by the Clackamus County sheriff's office.

ELLISON: Well as you read her affidavit that's not what she's saying. She's saying that she called the office, doesn't recall whose office or both or doesn't recall who she spoke with, but she believes, since it was some four years earlier that this is what happened. The lawyers are declaring under penalty of perjury –

JUDGE: But if the defense counsel knew that the sheriff's office had interviewed Flores, then the defense counsel could have pinpointed a request for that interview.

ELLISON: Absolutely. And – so either the government didn't disclose it as these lawyers are saying the government did not disclose it – and we have two lawyers declaring here under penalty of perjury that they were not advised. – Or these lawyers were ineffective, they fell below the *Strickland* standard.

JUDGE: Your time . . .

ELLISON: Now, I'd like to ask –

JUDGE: Your time has expired. By over a minute. Thank you.

MARTIN: Good afternoon, my name's Jennifer Martin. I'm appearing on behalf of the government in this matter. Let me take an opportunity to address first the arguments concerning the *Brady* allegations, and I think some factual clarifications would be helpful. I think they're set forth in the government's brief, but I think it might be helpful at this point to clarify a few things.

The first is that the documents that are at issue can be divided into two separate categories. The first are two documents that were discovered by the government in June of 1994, June 15th. Those were provided to counsel on June 29th, 1994, and the government concedes that those were not provided in pre-trial discovery. As best as we can figure out, the informant came to discuss working with the government, the police officers of the Clackamus County sheriff's office, concerning a federal fugitive, and initially made a request for case consideration. The officers spoke with the informant three times, initially in January of 1990 and those reports were apparently kept in a confidential informant file.

Two weeks later, after the defendant contacted the informant and advised the Clackamus County sheriff's office that the defendant wanted to initiate purchasing cocaine from her, the officers apparently opened another file. And that's the file that the remaining reports were in. The case file that specifically belonged to defendant Diaz.

When pre-trial discovery was initiated, the reports in the initial file . . . when the informant had first contacted the sheriff's office about working on the federal fugitive case . . . were not turned over and those should have been turned over.

As to the other reports, those were initially maintained by the Clackamus County Sheriff's office and when Maria Flores, the informant in this case, was charged, all reports were turned over to the Clackamus County District Attorney's office and they became the custodian of record for all of the reports in that case. The defense attorney at the time of the trial, Mr. William Uhle, subpoenaed the entire file from the Clackamus County District Attorney's office and that file should have contained in it all of the reports concerning the case other than the two initial reports, as I mentioned, that were apparently in an initial file that concerned a federal fugitive that the informant initially contacted the sheriff's office about.

JUDGE: If I understand counsel's argument correctly, what he's saying that your office knew about them, knew that they were in the hands of the Clackamus County sheriff's office but did not arrange to have them delivered to you.

In other words, as I understand his arguments, in spite of the subpoena or what the defendant may or may not have known, you knew and you didn't arrange to turn them over and the *Brady* material was critical to his case.

MARTIN: Your Honor, my recollection is set forth in my affidavit. Is that there were – my understanding at the time, frankly, is that the defense attorneys had possession of the reports and that the only reports they did not possess were the search warrant affidavit which had been sealed by the Clackamus County District Attorney's office. There was a hearing on that matter before

Judge Frye. Judge Frye ordered the matter to be unsealed. I had the search warrant unsealed by a Deputy District Attorney in the Clackamus County sheriff's office, and we personally delivered that report to defense counsel.

My best recollection, I don't recall which of the two defense counsels' office I called because it was about that time that counsel was shifting from Mr. Blackman to Mr. Uhle's office. But they were advised that there were additional reports concerning Ms. Flores' arrest at the Clackamus County District Attorney's office and Mr. Uhle subpoenaed those files directly. But the court is correct, my office did not go to the Clackamus County District Attorney's office and obtain those reports, frankly, ever.

JUDGE: There's a lot of briefing in this matter and I can't remember what they say. Where do we find in the record the fact that you notified whoever the counsel might have been that those records were available, and when did they come to the attention of the court? Was it in the second hearing that that material was provided to the court?

MARTIN: I'm sorry. I'm not clear on the court's question about the second hearing.

JUDGE: Well, this matter came back after the discovery of the data.

MARTIN: Yes, Your Honor. This matter was initially pending appeal from the trial court's denial of the first 2255 motion. And it was following the filing of Mr. Diaz's brief and prior to the time my brief was due that I first became aware that there were two documents which

had not been provided as pre-trial discovery, and following their discovery we notified counsel and the court of the discovery of those documents.

JUDGE: He's saying there were 12 documents he didn't get.

MARTIN: I understand that, that's why I wanted to clarify the distinction. There were two documents which were not provided. The remaining –

JUDGE: That were in your possession.

MARTIN: Yeah. Actually were in the Clackamus County sheriff's office possession, yes, Your Honor. The remaining documents were in the Clackamus County District Attorney's office, and that file was subpoenaed by the defense counsel.

JUDGE: You thought they had it?

MARTIN: Yes, Your Honor. And, in fact, in reviewing Mr. Uhle's affidavit it does not say that he did not receive them. What it says is that he doesn't recall reviewing anything in those reports that mentions a cooperation agreement with Ms. Flores, which is distinctly different from saying that he did not receive or review those reports.

JUDGE: My question was where did you put in the record the fact that you had told defense counsel, whichever counsel that was, that these records were available in Clackamus County?

MARTIN: Your Honor, that would be in the affidavit to which counsel was referring, and I believe

that was in the matter that the lower court's hearing leading to this appeal.

JUDGE: What exactly was the deal with Flores? What did she get?

MARTIN: Your Honor, there was no cooperation agreement with Ms. Flores. What happened, and what defense counsel could have argued had this matter been discovered in pre-trial discovery, the document the government concedes was not provided indicates that Ms. Flores originally requested case consideration in return for her providing information on a federal fugitive named José Yanez. The Clackamus County sheriff's office did not in fact provide any consideration for her assistance. Some two weeks later Maria Flores contacted the law enforcement officers after she had been contacted by the defendant, which led to the opening of this investigation. And at no time did Maria Flores request or receive any case consideration on this case.

JUDGE: Did she get – was she working off another case that she had pending?

MARTIN: Your Honor, it's my understanding that she was not. The situation at the time of the state charges filed against Ms. Flores was that we had – Oregon legislature had recently enacted state sentencing guidelines. There was a portion of the state sentencing guidelines that was found to be unconstitutional and – resulting eventually in probationary sentences for possession and distribution charges with virtually no difference in the amount of probationary time served for offenses. There was a lot of argument by counsel about the fact that Ms. Flores was permitted to plead to a possession

charge rather than a distribution charge. As noted in, I believe my own, I believe in my brief, there was no significant difference in the sentence for those two charges at that time in the state. The legislature subsequently amended the sentencing provisions so that there is now, but at that time there was virtually no difference.

JUDGE: Well apparently, as I understand from appellant's brief, that his principal, one of his principal complaints about the denial of information about Flores was that the defense was unable to impeach her when she said that she'd gotten caught on the first cocaine delivery she ever made.

MARTIN: I'm glad the court brought –

JUDGE: He was going to show that she was a, a career cocaine distributor or something.

MARTIN: Your Honor, I'm glad the court mentioned that.

JUDGE: And that it was her occupation or something, or whatever.

MARTIN: Initially, I want to mention that during the course of the government's presentation of the evidence, although in passing Ms. Flores mentioned that it was her first delivery that she was caught on, the government brought out during its examination of Ms. Flores that she was familiar with her brother's cocaine trafficking operation, had her explain terms that were unique to cocaine trafficking operations, and otherwise demonstrated her familiarity with it. We brought out the fact that she was being paid by – I believe she was going to be given a car or a truck – in return for taking over her

brother's business for two weeks. There was ample evidence by the end of the government's direct testimony that Maria Flores knew and understood a great deal about the cocaine trafficking business.

JUDGE: I think what counsel is bringing out though is her further involvement rather than knowledge. Pay and owe sheets, guns, the fact that there were other transactions that were in these records that could have been used to impeach her.

MARTIN: Your Honor, I think there are two responses to that, and the first is that they had that information by virtue of the possession of the search warrant affidavit leading to the execution of the search warrant at her brother's residence. The second, and more important area, is that the defense that was presented was not exclusively the two defenses upon which defense counsel would like you to consider at the moment. The defendant was also arguing at trial quite vigorously by testifying himself and calling three other witnesses, that Maria Flores' brother was not selling cocaine, that he was selling fake cocaine, and impeaching Maria Flores with evidence of extensive involvement in cocaine trafficking would undercut that defense upon which the defense relied significantly and which he argued quite vigorously.

JUDGE: Do I understand that Diaz's previous lawyer did not say in his affidavit that he had not received the 12 reports?

MARTIN: Your Honor, as I understand it, I believe Mr. Blackman did say that he did not receive the reports. Mr. Uhle is the attorney who subpoenaed the reports.

JUDGE: And he didn't say he didn't get them.

MARTIN: That's correct. My understanding of Mr. Uhle's affidavit is that he says that he reviewed the file and could not remember reviewing anything that was relevant to any consideration provided to Ms. Flores. Not that he didn't see or review the reports. Thank you.

JUDGE: Your time is expired. I'll give you one minute for rebuttal.

ELLISON: Thank you very much, Judge. Your Honor, at Excerpts of Record, page 161 and 162, is Mr. Uhle's affidavit. And he flat out states that he demanded the discovery and that he received little or nothing from the efforts of subpoenaing and his demand of the U.S. Attorney. So I just want you to know that he says he did not – and he says, "I have not seen and was unaware of most if not all of this material during the Diaz trial", meaning the exhibit supplements 1 through 12.

So there is a critical factual dispute in this case that Judge Frye should have given us an evidentiary hearing to deal with these issues that were unresolved, these major factual disputes that were unresolved.

Frankly, I think this record is complete enough for this court to say, my God, all these materials, her own confession that was never – of course there's a dispute – never turned over. This case should be, frankly, reversed without and the indictment dismissed for the abuse of *Brady*, as I see it.

And the last point that I'd like to point out is that there is the issue of the sentencing. The 2D1.1 issue of the two point sentencing enhancement. And I believe that the

record, looking at Judge Frye's finding, her sentencing judgment which is part of this record . . . and the testimony of the defendant was that he did not have immediate accessibility to the gun, and I'll submit it on that, Your Honor.

JUDGE: Thank you.

JUDGE: Wasn't it – on a procedural question, wasn't that sentencing point either resolved or waived in the original appeal of the conviction?

ELLISON: Well that – of course it wasn't raised at that time. *Bailey* hadn't been decided at that time, so it's a *Bailey* issue.

JUDGE: Oh, you're, oh, I see, you're trying to claim a benefit under *Bailey*.

ELLISON: Under *Bailey*, yes, sir.

JUDGE: And *Bailey's* a use case?

ELLISON: Correct, correct.

JUDGE: OK. Thank you.

ELLISON: Thank you very much.

JUDGE: Case just argued will be submitted.

– END OF TAPED TRANSCRIPTION –

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LOUIS JUAN DIAZ, Defendant-Appellant.	No. 95-35724 D.C. Nos. CV-93-1252-FR CV-90-203-FR ORDER (Filed Sep. 10, 1996)

Before: GOODWIN and BRUNETTI, Circuit Judges, and KING,* District Judge.

The appellant's motion for leave to file appendix in support of petition for rehearing and suggestion of appropriateness for rehearing en banc is DENIED.

The panel has voted to deny the petition for rehearing. Circuit Judge Brunetti has voted to reject the suggestion for rehearing en banc. Senior Circuit Judge Goodwin and Senior District Judge King have voted to recommend the rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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*Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CR No. 90-203-FR Civil No. 93-1252-FR
v.	)	OPINION
LOUIS JUAN DIAZ, Defendant.	)	(Filed May 18, 1995)

Kristine Olson
United States Attorney
Jennifer J. Martin
Special Assistant United States Attorney
888 S. W. Fifth Avenue, Suite 1000
Portland, Oregon 97204

Attorneys for Plaintiff

Patrick M. Birmingham
515 Oregon Trail Building
333 S. W. Fifth Avenue
Portland, Oregon 97204

Sherman M. Ellison
Sherman M. Ellison & Associates
The Sherman Oaks Galleria
15303 Ventura Blvd., 9th Floor
Sherman Oaks, California 91403-3110

Attorneys for Defendant

FRYE, Judge:

The matters before the court are (1) the motion of the defendant, Louis Juan Diaz, requesting the district court

to indicate its willingness to consider new evidence (#129); and (2) the supplemental motion of Diaz in support of habeas corpus petition (#135-1); and, motion to dismiss based upon "outrageous governmental misconduct" (#135-2).

BACKGROUND

On December 29, 1989, officers of the Clackamas County Sheriff's Department, conducting surveillance of a residence at 19205 S. End Road in Oregon City, Oregon identified as containing a large amount of cocaine, stopped a vehicle and seized nine ounces of cocaine from a female identified as Maria Flores.

Shortly after the arrest of Flores on December 29, 1989, in the early morning hours of December 30, 1989, officers of the Clackamas County Sheriff's Department executed a search warrant issued by a judge of the Circuit Court of the State of Oregon for the County of Clackamas at 19205 S. End Road in Oregon City, Oregon, the residence of Jose Bernal, the brother of Maria Flores.

Maria Flores was a participant in the activities that led to the arrest of the defendant, Louis Juan Diaz, on June 15, 1990. Throughout all pretrial and trial proceedings, Diaz knew that Flores had been arrested for the crime of possessing nine ounces of cocaine by the Clackamas County Sheriff's Department on December 29, 1989 during the execution of the search warrant at the residence of her brother Jose Bernal; that Flores was interviewed by Detective Craig Roberts after her arrest; and that Flores had implicated Diaz in criminal activity during the interview.

In the affidavit dated June 15, 1990 that he submitted in support of a search warrant, an arrest warrant, and a criminal complaint, Detective Roberts states, in part:

> On December 30, 1989 our office executed a search warrant issued by Clackamas County Judge Robert Selander for cocaine at the residence of Jose Bernal. An individual by the name of Maria Flores was taken into custody as a result of the warrant. Maria Flores told me about her knowledge regarding cocaine trafficking. Maria Flores told me that her brother Jose Bernal sold multiple kilograms of cocaine to several individuals. Maria Flores told me that Jose Bernal had asked her to take over his cocaine distribution while he took a vacation. Maria Flores told me that she agreed to assist her brother with his cocaine business, and had specifically agreed to possess and sell cocaine on his behalf.
>
> Maria Flores told me that one individual that her brother sold cocaine to was a subject whom she only knows as "Louis" and that "Louis" works for U.S. West Communications. Maria Flores told me that she knows this from conversations with both her brother and "Louis". Maria Flores told me that she had not initiated any contact with "Louis" since her arrest, however, he continues to call requesting to purchase multiple kilograms of cocaine.

Affidavit in Support of a Search Warrant, an Arrest Warrant and a Criminal Complaint, pp. 1-2.

On July 11, 1990, a federal grand jury returned an indictment against Louis Juan Diaz, charging him with

the crime of the attempted possession with the intent to deliver more than 500 grams of cocaine.

On August 6, 1990, counsel for Diaz filed a Motion for Discovery, which was a request for all *Brady* materials, all police reports, and all police reports and records relating to the arrest of Maria Flores on December 29, 1989 and the search of the residence of Jose Bernal on December 30, 1989.

On October 11, 1990, in the Government's Memorandum in Response to Defendant's Request for Jencks Act Material, the government states that "[t]he government has provided defense counsel with virtually all of the investigative reports within its possession." *Id.* at 2.

On December 3, 1990, counsel for Diaz filed a Motion for Order Unsealing Documents and Records. He sought all of the documents relating to the search warrant, which was issued on December 29, 1989, for the search of the residence of Jose Bernal. Attached to the Motion for Order Unsealing Documents and Records was the Custody Report for Maria Flores, Report No. 89-41531, which reflects that she was arrested on December 29, 1989 by a Clackamas County Sheriff's Deputy. Counsel for Diaz filed the Motion for Order Unsealing Documents and Records in order to obtain "all records and documents pertaining to the execution of the search warrant which resulted in Ms. Flores' arrest [which] were sealed by order of the Clackamas County Circuit Court dated January 10, 1990." *Id.* at 3.

On January 16, 1991, the court granted the motion of Diaz for an order unsealing the documents. The documents relating to the execution of the search warrant,

which had been sealed by the state court, were provided by the government to Diaz. The sealed documents consisted of the warrant issued for the search of the residence of Jose Bernal and the affidavit of Detective Roberts submitted in support of that search warrant.

The reports prepared after the execution of the search warrant on December 30, 1989 and the reports of the arrest and the interview of Flores never were sealed. They were in the possession of the Clackamas County District Attorney. Counsel for Diaz subpoenaed the case file and other records relating to the arrest of Flores on December 29, 1989 from the Clackamas County District Attorney.

At that time, the Assistant United States Attorney believed that copies of the reports relating to the arrest of Flores, the reports of her interview, and other documents in the Flores file were available to counsel for Diaz in a related criminal proceeding for the cost of copying the documents. There is no evidence, implication or claim in this record that these reports were not in the possession of the Clackamas County District Attorney and available to counsel for Diaz.

Special Assistant United States Attorney Jennifer Martin has submitted an affidavit, in which she states that it is her belief that she left a message with a staff person in the office of counsel for Diaz that:

> any additional reports [beyond the documents unsealed by order of the court] needed from the arrest could be obtained from Clackamas County. I recall leaving this message because I thought it was unlikely the defendant would need any other reports, as it was my impression

> he was missing only the documents which had been sealed by court order, and sent to him by Detective Roberts. As I did not have the arrest reports in my possession, I referred defense counsel to the location from which the reports could most easily be obtained, i.e. the Clackamas County District Attorney's Office.

Affidavit of Jennifer J. Martin, pp. 2-3 (attached as Exhibit #1 to the Government's Response to Defendant's Supplemental Motion in Support of Habeas Corpus Petition).

William Uhle, counsel for Diaz during this pretrial period, has submitted an affidavit, in which he states, in part:

> The success of th[e] defense depended upon being able to impeach the credibility of Flores' testimony with promises the government had made her in return for her cooperation. I demanded this information in discovery; I asked for it from Assistant U.S. Attorney, Jennifer Martin; I have not read the transcript, but I believe I asked government agents Lowe and Roberts for all that they had promised Maria Flores for her cooperation. I also had my investigator, William Driver, search the records of the Clackamas County court for this information. In addition, I subpoenaed the state prosecutor regarding the records and case file on Maria Flores. Through these efforts little, if anything, was produced concerning Flores' agreement to cooperate with authorities.

Affidavit of William Uhle, p. 1 (attached as Exhibit #18 to Defendant's Exhibit Supplement No. 5).

The jury trial of *United States v. Louis Juan Diaz* began on March 12, 1991. Diaz's defense was primarily that he was entrapped by Maria Flores.

During his cross-examination of the government's witness, Maria Flores, counsel for Diaz sought to impeach the credibility of Flores by questioning her about her knowledge of the drug business conducted by her brother, her arrest on December 29, 1989 for possessing nine ounces of cocaine, and her drug dealing activities prior to December 29, 1989.

Flores testified at trial that she had entered a plea of guilty to the charges brought by the State of Oregon as a result of her arrest on December 29, 1989 just prior to her testifying in the Diaz trial and had received a sentence of 18 months probation. Flores testified on cross-examination that Detective Craig Roberts and Deputy Kim Lowe of Clackamas County did not promise her anything concerning her state prosecution for her involvement in the arrest of Diaz. Flores testified that she had not appeared in court from the time of her arrest on December 29, 1989 until the time of her sentencing and the giving of her testimony in the Diaz case on March 13, 1991, but that she had had a number of contacts with certain deputies from the Clackamas County Sheriff's Department during that time period.

Counsel for Diaz did not use any records from the arrest of Flores on December 29, 1989 to impeach the testimony of Detective Roberts and Deputy Lowe during his cross-examination of them and states that he would

have used some of this material during the cross-examination of Flores, Detective Roberts and Deputy Lowe if he had had this material in his possession.

The jury found Diaz guilty of the crime charged in the indictment.

On May 24, 1991, the court sentenced Diaz to a term of 109 months in prison. Thereafter, Diaz filed an appeal with the United States Court of Appeals for the Ninth Circuit.

On April 15, 1992, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction entered by this court and dismissed the appeal.

On May 21, 1993, Diaz filed a motion for a new trial based upon newly discovered evidence; for an order to permit oral argument on said motion for a new trial; and for an evidentiary hearing on said motion for a new trial. On January 6, 1994, the court denied the motions of Diaz. Thereafter, Diaz filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence.

On January 27, 1994, this court filed an opinion and order denying the motion of Diaz under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence.

On February 7, 1994, Diaz filed a notice of appeal. After receiving the brief filed by Diaz in the appeal, the government learned of the existence of a report which should have been provided to Diaz in the course of pretrial discovery.

In a letter dated June 29, 1994, Special Assistant United States Attorney Jennifer J. Martin wrote to counsel for Diaz as follows:

Enclosed please find a six page special report by Clackamas County Sheriff's Deputy Kim Lowe dated February 1, 1990. I received a copy of this report for the first time after receiving your opening brief to the Ninth Circuit on the § 2255 motion. AUSA Dick Scruggs discovered the report while coordinating discovery for another case in which Ms. Flores is a witness.

In September of 1990, I asked the Clackamas County Sheriff's Office to provide all reports concerning defendant Louis Diaz's case to me in order to provide discovery. In January of 1990, Ms. Flores provided the Clackamas County Sheriff's Office with information concerning Jose Yanez, an individual unrelated to the investigation involving defendant Louis Diaz. As the entire first page of the report, and the majority of the information concerns Ms. Flores' knowledge of Jose Yanez's involvement in cocaine trafficking, it appears the officers inadvertently omitted this report when providing the government with copies of the other reports relating to defendant Louis Diaz's case. Unlike the other reports in this investigation, it is not immediately apparent that the report discussed your client. The only references to Mr. Diaz are on page two as the name "Luis", with some identifying information, and on page five as a cocaine customer of Jose Bernal.

Had I possessed the report in 1990 or known of its existence, it would have been provided as discovery. As I have only recently learned the report exists, I am providing you with a copy as soon as possible. Please understand that although I believe the defendant was entitled to the report, and that I would have

provided the report had it been in my possession in 1990, I do not believe the report changes any material aspect of the case.

The report reflects Ms. Flores initially contacted the Clackamas County Sheriff's Office on January 26, 1990. At that time she requested case consideration for information concerning Jose Yanez. Although she made this request, the Clackamas County Sheriff's Office did not enter into any type of agreement with her in return for any information she provided. Ms. Flores did not disclose any knowledge of defendant Diaz during the initial conversation on January 26, 1990. The report reflects Ms. Flores spoke with Deputy Lowe again on January 27, 1990. During this second conversation, Ms. Flores disclosed additional information about Jose Yanez. Again, she made no mention of defendant nor did she renew the discussion of an agreement in exchange for the information.

On January 30, 1990, Deputy Lowe and Detective Roberts met with Ms. Flores. It is during this third conversation that Ms. Flores briefly mentions "Luis" as one of her brother's cocaine customers. There was no further discussion or identification of defendant Louis Diaz until he contacted Ms. Flores requesting her to supply him with cocaine approximately two weeks later.

At no time did Ms. Flores ask for or receive any promises or any agreement from the Clackamas County Sheriff's Office or the Regional Organized Crime and Narcotics Task Force concerning her information or assistance in the investigation of defendant Diaz. By January 30, 1990, Ms. Flores knew the officers would

> not enter into an agreement. The testimony of Ms. Flores, Detective Roberts and Deputy Lowe all reflect that no promises or agreements were made to Ms. Flores in return for her information or assistance in this case. DDA Therese Gustafson and I both attested to the fact that there was no agreement concerning her charges in state court.
>
> I will address this issue in my response to your brief. Because I believe you to be entitled to receive the report as soon as possible, I am sending the report and this letter to you before revising my brief to address its discovery.

Exhibit 12 (attached to Defendant's Exhibit Supplement #-4).

On February 10, 1995, Diaz filed a motion requesting this court to consider new evidence. In this motion, Diaz asks the court to consider the exhibits attached as "Exhibit Supplement #-4," which contained Exhibits 1 through 16 as follow [sic]:

– Exhibits 1 through 11 are police reports and records relating to the arrest of Maria Flores on December 29, 1989 and the execution of the search warrant at the home of Jose Bernal on December 30, 1989;

– Exhibit 12 is a letter dated June 29, 1994 from Special Assistant United States Attorney Jennifer Martin to counsel for Diaz;

– Exhibits 13 and 14 are the "Clackamas County Sheriff Special Report" and the "Special Consent Form" provided to counsel for Diaz by the letter included as Exhibit 12; and

– Exhibits 15 and 16 are excerpts of transcripts from hearings on pretrial motions held on October 7 and 14, 1994 in *United States v. Bracamontes*, CR 93-400-HA.

On February 24, 1995, the United States Court of Appeals for the Ninth Circuit "remanded [this case] to the district court for reconsideration in light of the material discovered by the government which should have been provided as pretrial discovery."

On March 10, 1995, Diaz filed a Supplemental Motion in Support of Habeas Corpus Petition; and, Motion to Dismiss Based Upon "Outrageous Governmental Misconduct."

The government has filed a response to both of Diaz's motions.

CONTENTIONS OF THE PARTIES

Diaz contends that the evidence contained in Exhibit Supplement #-4 containing Exhibits 1 through 16:

> would be devastating to Maria Flores' credibility. The areas that her credibility would be severely hampered would include but not be limited to . . . [1] the fact that she lied about how many times she had been involved with selling and delivering cocaine; [2] the number of weapons [including a machine gun found at her home]; [3] the fact that she lied about there being no "cooperation agreement"; [4] that she lied about any benefit received as a result of her cooperation with the government as it related to her pending cocaine charges; [5] that she was to be paid $2,000.00 per week for her cocaine deliveries for her brother-Jose Bernal; [6] the fact that

> she lied to Judge Bagley when she entered her plea; and [7] that she and her boyfriend-MAX had taken over her brother's cocaine distribution business, while her brother was out of the state.

Defendant's Motion Requesting the District Court to Indicate its Willingness to Consider new Evidence, pp. 4-5.

Diaz contends that the failure of the government to come forth with this evidence constitutes *Brady* violations requiring a new trial. In addition, Diaz contends that his conviction should be set aside and the indictment dismissed on the grounds that the prosecutor either knowingly permitted perjured testimony or violated her obligations under *Brady* and Fed. R. Crim. P. 16. Diaz argues that the "prosecution permitted its witness-MARIA FLORES to falsely and perjuriously testify at the trial herein" (Supplemental Motion in Support of Habeas Corpus Petition; and, Motion to Dismiss Based Upon "Outrageous Governmental Conduct," p. 11), and that the government suppressed evidence or failed to disclose evidence.

The government contends that the only newly discovered evidence is contained in Exhibits 13 and 14 of Diaz's Exhibit Supplement #-4 and does not justify any change in any of the court's prior rulings. The government concedes that Exhibits 13 and 14 of Diaz's Exhibit Supplement #-4 provides impeachment information in that Flores initially requested favorable treatment in exchange for information and made statements concerning her knowledge of the cocaine trafficking of her brother, but contends that the newly discovered evidence

contains no information which would undermine the jury's decision to convict Diaz.

The government contends that the documents in Exhibits 1 through 11 of Diaz's Exhibit Supplement #-4 were available to Diaz prior to his trial; that counsel for the government did not have possession of these documents; that counsel for the government notified counsel for Diaz that the documents were available for the cost of copying them from the Clackamas County District Attorney's Office; that the government was never made aware of any problems with the unavailability of the reports; and that the government was never aware of any dispute about whether counsel for Diaz had the arrest reports prior to or during the trial.

ANALYSIS

To prove a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant must prove that the government withheld material, exculpatory evidence. *Hendricks v. Zenon*, 993 F.2d 664, 673 (9th Cir. 1993). In order to be deemed material, "the evidence must have been that which if disclosed to the defense, would have changed the result of the proceeding." *Id.*

In *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989), the court explained:

> [T]he scope of the government's obligation under Rule 16(a)(1)(C) should turn on the extent to which the prosecutor has knowledge of and access to the documents sought by the defendant in each case. The prosecutor will be deemed to have knowledge of and access to

> anything in the possession, custody or control of any *federal agency* participating in the same investigation of the defendant.

Id. at 1036 (citation omitted) (emphasis added).

In this case, counsel for Diaz knew that there were reports of the arrest of Maria Flores on December 29, 1989 and that these reports were in the possession of the Clackamas County District Attorney and not in the possession of the Assistant United States Attorney. Counsel for Diaz subpoenaed these documents.

There is no indication in this record that the Assistant United States Attorney had possession of these records or in any manner prevented Diaz from obtaining them. There is no evidence in this record that counsel for Diaz brought to the attention of the court or brought to the attention of the Assistant United States Attorney any difficulty he had in obtaining records from the Clackamas County District Attorney.

The court cannot conclude that the Assistant United States Attorney violated Rule 16 by failing to produce the reports in Exhibits 1 through 11 of Diaz's Exhibit Supplement #-4. These reports are of a state arrest of a government witness. They were not in the possession of the federal government, and they were readily obtainable from state authorities. The court concludes that the conduct of the government was not outrageous in this case, and that Diaz has not identified any perjury to which the Assistant United States Attorney could have been an accomplice.

Even if the court were to conclude that the government was required under Rule 16 or *Brady* to produce the

documents listed in Exhibits 1 through 11 of Diaz's Exhibit Supplement #-4, the court would conclude that these reports were not "material." In *United States v. Zuno-Arce*, 44 F.3d 1420, 1428 (9th Cir. 1995), the court explained that "[t]he question that remained, was whether or not the late-disclosed materials, if tendered to the defense sooner, would allow the district judge to say that there was a reasonable probability that, but for the nondisclosure, the result of the proceeding would have been different."

The inculpatory conversations between Flores and Deputy Lowe, which were arranged by Flores, were tape-recorded and offered into evidence at trial. The law enforcement officers who witnessed the attempt by Diaz to exchange cocaine for currency and collateral testified at trial. Deputy Spang and Detective Roberts both testified that Diaz confessed his attempt to purchase a kilogram of cocaine after his arrest, as well as his involvement in selling cocaine since 1988. In his confession, Diaz implicated three other individuals – Sonnabend, DeLuca and Burke. Sonnabend, DeLuca and Burke testified against Diaz, corroborating the testimony of the police officers about the statements that Diaz had made to them regarding his involvement in cocaine trafficking.

The information in Exhibits 1 through 11 of Diaz's Exhibit Supplement #-4 provides additional information about the involvement of Flores in her brother's cocaine trafficking operation. Flores was impeached during cross-examination by counsel for Diaz on this very subject. The jury in this case had the benefit of the tape-recorded conversations between Diaz and the government agent

from which he was attempting to buy a kilogram of cocaine.

Given the fact that Diaz was in effect "caught in the act" and thereafter confessed, this court could not conclude that there was a reasonable probability that the result of the proceeding would have been different if counsel for Diaz had obtained Exhibits 1 through 11 of Diaz's Exhibit Supplement #-4 from the Clackamas County District Attorney prior to the time of trial. There was no evidence in this case that Diaz was "entrapped" except for his own testimony, and the jury was entitled to discount his testimony given other evidence in the case. The jury was entitled to believe the testimony of other witnesses who clearly set out Diaz's involvement in the crime for which he was convicted.

The "Clackamas County Sheriff Special Report" attached as Defendant's Exhibit 13 and the "Special Consent Form" attached as Defendant's Exhibit 14 are newly discovered evidence in this case.

Defendant's Exhibit 13, the "Clackamas County Sheriff Special Report," reflects the first three contacts that the informant, Maria Flores, had with the Clackamas County Sheriff's Office. These contacts were on January 26, 1990, January 27, 1990 and January 30, 1990. The Special Report sets out in detail the knowledge that Flores had of her brother's cocaine trafficking and focuses upon an individual known as Jose Yanez. The writer of the Special Report states on page 3 that Flores "wanted to work with our department in exchange for consideration on the charges pending against her for D.C.S. in Clackamas County." The Special Report contains a reference on page

2 to Diaz as "LUIS," a "Hispanic male adult," "works for telephone company," "Pager: 237-7935." "Luis" is further mentioned on page 5 as one of the customers of Jose Bernal, a cocaine supplier.

Information regarding the knowledge and involvement of Flores in Bernal's cocaine trafficking was provided to Diaz during pretrial discovery when he obtained the search warrant and the affidavit supporting the motion for a search warrant. The information contained in the Special Report is cumulative, and the court concludes that it would not have changed the outcome of the trial if it had been timely disclosed for the reasons set out above.

The information in the Special Report that Flores initially requested favorable consideration in exchange for information is relevant to impeach the testimony of Flores. The report would have permitted counsel for Diaz to ask Flores if she had requested any benefit in exchange for information when she initially contacted the Clackamas County Sheriff's Office. This is an area of impeachment which was pursued by counsel for Diaz at the time of trial in the cross-examination of Deputy Lowe, Detective Roberts and Flores.

Deputy Lowe, Detective Roberts and Flores testified that Flores did not receive any agreement from the Clackamas County Sheriff's Office or the Regional Organized Crime and Narcotics Task Force for special consideration. The Special Report does not contain any information inconsistent with this testimony. Defendant's Exhibit 14, the "Special Consent Form," confirms that

Flores did not have an agreement for special consideration or receive special consideration for her assistance and testimony.

Defendant's Exhibits 15 and 16, excerpts of transcripts from hearings on pretrial motions held on October 7 and 14, 1994 in *United States v. Bracamontes*, CR 93-400-HA, are not newly discovered evidence in this case and do not support reconsideration of any prior ruling of this court.

Finally, the court recognizes that the failure of counsel for Diaz to obtain Exhibits 1 through 11 of Diaz's Exhibit Supplement #-4 from the Clackamas County District Attorney prior to trial could be relied upon to support a claim of the ineffective assistance of counsel.

In order to prevail on a claim of the ineffective assistance of counsel, a defendant must show that 1) counsel's performance fell below an objective standard of reasonableness and, if so, 2) there is a reasonable possibility that but for the errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). There is a strong presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance, and review of counsel's performance is highly deferential. *Id.* at 689.

For the reasons already set forth in this opinion, this court declines to conclude that there is a reasonable possibility that, but for the errors of counsel for Diaz, the result for Diaz would have been different. In addition, there is no evidence that the performance of counsel for Diaz fell below an objective standard of reasonableness. Counsel for Diaz obtained the sealed documents and

made the same arguments and proceeded with the same areas of cross-examination that would have been pursued if the documents at issue here had been obtained.

CONCLUSION

The motion of Diaz requesting the district court to indicate its willingness to consider new evidence (#129) is granted. The supplemental motion of Diaz in support of habeas corpus petition (#135-1) and to dismiss based upon "outrageous governmental misconduct" (#135-2) is denied.

DATED this 18 day of May, 1995.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF OREGON

UNITED STATES OF AMERICA,	)	CV No. 93-1252-FR
	)	
Plaintiff,	)	CR No. 90-203-FR
	)	
vs.	)	MAY 8, 1995
	)	
LOUIS JUAN DIAZ,	)	Portland, Oregon
	)	
Defendant.	)	

TRANSCRIPT OF TELEPHONIC ARGUMENT PROCEEDING

BEFORE THE HONORABLE HELEN J. FRYE

APPEARANCES:

FOR THE PLAINTIFF: Jennifer Martin

FOR THE DEFENDANT: Sherman Ellison

COURT REPORTER: Dennis R. Grube
225 U.S. Courthouse
Portland, OR 97205
(503) 326-3113

[p. 2] (May 8, 1995)

PROCEEDINGS

THE COURT: Good morning. This is Judge Frye speaking.

Mr. Ellison, you're there on behalf of Mr. Diaz; is that correct?

MR. ELLISON: Yes, Your Honor. Thank you.

THE COURT: And Ms. Martin, you are representing the Government today?

MS. MARTIN: Yes, Your Honor.

THE COURT: All right. And these are the defendant's motions and, Mr. Ellison, you may proceed.

MR. ELLISON: Yes, Your Honor. I wanted to ask, if the Court doesn't mind –

THE COURT: Mr. Ellison, one minute right here. I have got my phone up here as loud as I can get it and I need to have you speak up a little bit or especially directly into the mouthpiece.

MR. ELLISON: All right. I'm doing that but –

THE COURT: That's better.

MR. ELLISON: I'll try to do it a little louder.

THE COURT: Okay.

[p. 3] MR. ELLISON: It appears to me that what we're proceeding on, if I understood the Court's order, is the legal argument on the pending motions before this Court.

THE COURT: Yes.

MR. ELLISON: And the legal – the pending motions before the Court seem to me to be primarily the supplemental motion to dismiss or the supplemental motion regarding the habeas corpus proceeding and the motion to dismiss for outrageous governmental misconduct.

THE COURT: Yes.

MR. ELLISON: And I wasn't clear, it wasn't clear to me and I was asking Ms. Martin earlier for some input, on that but it seems that as far as I'm concerned that's the motion that we're here on today, not the motion that seems to be growing here as it seems the Ninth Circuit has on it's own remanded this case to the Court to reconsider its earlier ruling on the 2255.

So with that as a president [sic], it seems to me – is that correct, am I stating the position correctly, Your Honor?

THE COURT: Well, I'm not absolutely sure whether – you know, I haven't ruled on whether or not I will consider new evidence but I wanted to hear, you know, your arguments today.

MR. ELLISON: It seems to me that the Court at [p. 4] least should at the very minimum consider this newly-discovered material. And it's my understanding that the Ninth Circuit when they issued their order – and I'm looking for the order date. I believe it's the – their order dated the 24th of February, says that this case is remanded to the District Court for reconsideration in light of the newly-discovered material which should have been provided as pretrial discovery. And then the Court mandates – the Ninth Circuit mandates, dated April 24th, says it is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be and is hereby remanded.

Now, in any event, I'm operating under the assumption that they've asked you to reconsider the 2255 in light of the newly-discovered evidence. And so that's how I perceive us procedurally today.

THE COURT: All right. Go ahead.

MR. ELLISON: I think what the Court has before us is – are four options in dealing with this revelation and, one, the Court could deny the 2255 again and let the Ninth Circuit do whatever remedy they feel is appropriate.

The second option is that this Court can grant an evidentiary hearing.

THE COURT: That's the second one, grant an evidentiary hearing?

[p. 5] MR. ELLISON: Yes.

THE COURT: Okay.

MR. ELLISON: And permit us of course to deal with the Brady violation, and as far as Brady violations go, we would be dealing with among other things the how, the when, the where, the why, the who as it relates to these withheld reports that have been submitted in our Exhibit Supplement No. 4. It would also permit us to go into matters that related to the benefits that Maria Flores received as well as the benefits that Mr. Sonavin (ph) received in this matter.

The second issue to be discussed in my opinion at the evidentiary hearing would be the perjury that was presented to this Court by the testimonies of Maria Flores, Craig Roberts and Kim Lowe. And that of course is now clearly demonstrated in these reports that are parts of Exhibit Supplement No. 4.

And of course the third issue to be evaluated through the evidentiary hearing would be the impact of the above

on the ineffective assistance of counsel issues raised earlier as well as separate issues of ineffective assistance that I have already urged in my pleadings earlier.

It seems to me that the most problematic resolution for the Government in this case is the granting [p. 6] of an evidentiary hearing. But that's my personal opinion.

The third option that I see available to this Court is to grant the 2255 and order a new trial for Mr. Diaz.

That of course is also very problematic for the Government because at a new trial the perjury that would be so clearly and easily demonstrated would make a conviction almost impossible. If not impossible.

The fourth option available to this Court is again to grant the 2255 but to dismiss the indictment essentially on the grounds of the law enforcement misconduct in this case by not turning over the Brady materials. That of course in my opinion is the most appropriate and of course the easiest for the Government.

Those are the four options that I see available to this Court at this point.

I have much more in detail to get into with this Court and I'm not sure if the Court wants to hear any response yet from the Government or wants me to continue.

THE COURT: No. I want you to go ahead and make your full argument.

MR. ELLISON: My arguments that I'm making this morning, Your Honor, I know the Court is aware of this but I want it for the record, incorporates all the arguments in the pleadings that we submitted to this

Court. Because, as [p. 7] this Court now knows, a number of trees have fallen as relates to this litigation. There's a lot of paperwork, it's very voluminous, the issues are numerous and I know the Court does not need me to reiterate all the arguments that I have placed in the particular and appellant pleadings, but I incorporate those arguments as if I'm making them to this Court. I know the Court has reviewed them already.

THE COURT: Yes.

MR. ELLISON: However, I think what's clear to us is that by all of these documents either not being tendered by the law enforcement officers to the prosecuting attorney or not being obtained by the prosecuting attorney and tendered to the defense attorney, just the shear number of these documents, close to 13 documents, reports and confessions of Maria Flores and the arrest report that relates to her own conduct, shows that there has been a pattern of governmental misconduct relating to Brady that is so outrageous and extensive in this case that in my opinion the real question is how high up the Government chain does it go. Does it stop at the law enforcement level, which clearly exists there, or does it possibly go up the chain a little further?

It appears to me that the Brady violation [sic] are unquestionably demonstrated by the record and of course [p. 8] conceded by the Government. The Government conceded it only as to item No. 13, I believe, or perhaps 13 and 14 in Exhibit Supplement No. 4. However, of course they obviously clearly exist as to items 1 through 12 as well.

It is so extensive that the pattern is so tainted that due process of fairness requires that the very minimum a new trial in this case. I detailed out at great length in the motion for the Court to indicate its willingness to consider this newly-discovered evidence and in the supplemental motion in support of habeas corpus and motion to dismiss as well as my reply memorandum. The specific impasse of these newly-discovered reports including the confession of Ms. Flores, Exhibit No. 5 to Exhibit Supplement No. 4, and of course item No. 14 with respect to the consent form which is signed on January 30th, 1990 where she agreed to assist Government, she agreed to testify for Government. All of these things which were denied by the Government and by the witnesses during the course of the trial and the proceedings in this case.

Certainly one of the issues that we would want to explore in an evidentiary hearing, if the Court were to adopt that option, would be what were the benefits that were promised or that Maria Flores derived in exchange for her cooperation. Certainly one of the obvious ones is [p. 9] the fact that she was prosecuted on the state side. Now, I think it's clear from the record that that is a benefit that she received.

Certainly the fact that she also was permitted to plea to the possession counts and not the distribution counts was another concession and benefit she received.

Thirdly, of course, the 18-months probation with no probation report being ordered by the Court, prior to imposing probation, and certainly we now have from our

Exhibit Supplement No. 4, Exhibits 15 and 16, the transcript from proceedings, at least one of those are transcripts of proceedings in the Bracamontes case where – acknowledges that we discussed her cooperation with Terry Gustafson. This is a complete contradiction to what Terry Gustafson has now said in her declaration before this Court.

When I of course was preparing for this argument I excised from all these pleadings in these four declarations from Ms. Martin in this case the most recent declaration from Ms. Martin which was dated March 15th, 1995 in response to these most recent motions. She acknowledges that she was aware of the existence of the Maria Flores report and interview with Detective – presumably obviously with Detective Roberts.

[p. 10] It seems to me now there's no way for us to in any way conclude that Government at the very minimum, meaning law enforcement, was aware of these Brady materials and probably, based upon the declaration of the Government, the Government, the prosecution themselves.

The very recent case that I'm sure the Court is familiar with and perhaps even more familiar than I is the Kyles vs. Whitely (ph), U. S. Supreme Court case (unintelligible) 1995. Kyles of course summarizes *Brady v. Maryland*, U.S. v. Abers (ph), *United States v. Bagley*, and then of course Kyles v. Whitely. In that the U.S. Supreme Court decision was reversed, as this Court knows, a capital murder conviction. Essentially it said that if there's a reasonable probability that the suppressed evidence

undermines the outcome of the trial, that the new trial at a very minimum should be ordered.

And what was clear from Kyles v. Whitely, and of course empathizing out of *U.S. v. Bagley,* was that it's the cumulative effect of the suppressed material. So what was in fact suppressed were all the negative factors and the details of Maria Flores' involvement with law enforcement. And the impact of that is that she lied when she testified about her involvement. The Government agents, knowing this, did nothing to prevent that and then they themselves withheld this from the Court. And they [p. 11] perjured themselves when they testified in this case.

So it seems to me that the cumulative effect of this – of these Brady violations occurred during – by Flores and by Roberts and Lowe, and the impact on the effective assistance of counsel to which Mr. Diaz was entitled rendered the new trial at a very – at the minimum mandatory to me.

When we look at the recent declarations by both Mr. Blackman and Mr. Uhle, and I believe those have been submitted to the Court under separate cover from my own pleadings, that they both acknowledge that they were not aware and did not have these reports. So –

THE COURT: All right.

MR. ELLISON: That's sort of a summary of my feelings about the case, Your Honor.

THE COURT: All right. Before I go on and ask Ms. Martin, I want to make sure that Mr. Diaz is able to hear everything.

Is Mr. Diaz on? Can I get on the record that he's there?

MR. DIAZ: Yes, and I can hear perfectly fine.

THE COURT: All right. Thank you, Mr. Diaz. Okay. Now, Ms. Martin, go ahead.

MS. MARTIN: Thank you, Your Honor.

As a preliminary matter, it's the [p. 12] Government's position that there are only two documents which could be characterized as newly-discovered evidence and those are the two documents that Mr. Ellison identified the Government concedes were not provided. In fact the Government on it's own initiative provided the Court with the first of those documents in June of 1994 after discovering that they existed and that was the report written by Deputy Kim Lowe concerning the first contact with Maria Flores back in January of 1990.

The remaining reports, which Mr. Ellison contends were not provided, I believe that's simply inaccurate for two reasons. The first is that in fact the defense was notified and was aware that the reports existed. The reports were in part a topic of the motions that occurred on December 12th of 1990. I advised – I don't recall after four years whether I called Mr. Blackman's office or Mr. Uhle's office, but I do recall calling one of the offices and saying if the reports – if you want to get copies of the reports, they're at the Clackamas County District Attorney's office. I know from Mr. Uhle's affidavit that he in fact subpoenaed the file and subpoenaed the prosecuting attorney for the Flores case as well as subpoenaing

another district attorney who was responsible for unsealing the records concerning the execution of the search warrant at the Pernall residence. [p. 13] The idea that the defense was unaware – have access to the reports simply doesn't make any sense.

It is true that we don't know what Mr. Uhle decided to do about the context of the files when he got them. But I think that this is more appropriately explained perhaps because of the difficulties that occur in changing files from attorneys. And the records that Mr. Ellison has submitted in this case supports that theory.

As the Court knows and as the record reflects in this case, the defendant engaged in discharging a number of attorneys during the course of this case. He initially retained Mr. Matasar. On August 8th of 1990 he retained Mr. Blackman who was then substituted as counsel for Mr. Matasar. On January 22nd, one day before the original setting trial date, which I believe is part of the difficulty in the Court's consideration of Mr. Ellison's arguments concerning these reports, the defendant substituted Mr. Uhle as counsel for Mr. Blackman. And then obtained a setover for the trial date.

After the defendant was convicted in March he retained Mr. Fast (ph) and Ms. Carmack of Schwabe Williamson in addition to Mr. Uhle who assisted him on the appeal. And I believe it was during the same time period that the defendant initiated a civil suit against Clackamas County and the individual officers as well. And I'm not [p. 14] sure what materials, if any, were

provided to the defendant in Mr. Uhle's file in that litigation. On May 6th Mr. Ellison applied pro hac vice under the stipulation of Mr. Birmingham.

I bring these list [sic] of different attorneys up simply to emphasize the discrepancies in the representations made to the Court about an intentional act. And I truly think that this is not an intentional act on the part of anyone, it's simply the difficulties of transferring files between attorneys, most of the time in the course of not this one aspect of litigation but a number of different aspects of litigation, including a civil case brought by the defendant himself.

It's clear for example that Mr. Uhle possessed some of the records which Mr. Ellison lists as missing from the records he received from Mr. Uhle. For example in Defendant's Exhibit Supplement No. 5, Exhibit 19, and actually I think on the first page of Exhibit 20, Mr. Ellison lists the items he did not receive from Mr. Uhle. A number of those items actually appear in the inventory of items he's received which is in Exhibit 20 under slightly different descriptions. For example, in Exhibit 19 Item 2.3 suggests Mr. Ellison didn't receive any investigation reports relating to Mr. Deluca who's a governmental witness. But in Exhibit 20, page 20 we see [p. 15] that he received a three-page investigative report, plea agreement, and on page 3 of the same document he received the position to enter a plea to the information, waiver of indictment and order waiving indictment.

On the same Exhibit 19, the last item on the list, number 7, Mr. Ellison indicates he didn't receive the signed consent and Miranda waiver card. Clearly the

defendant had those three files. Those items were provided by the Government to Mr. Blackman in pretrial discovery in 1990. They were entered as Exhibits 1 and 2 in the pretrial motion December 21st of 1990. And they were entered as Exhibits 1 and 2 at trial. But Mr. Ellison reflects that he didn't receive them in the materials he received from Mr. Uhle. This suggests certainly that there were some materials that just weren't conveyed from Mr. Uhle to Mr. Ellison, although Mr. Uhle had them prior to the course of the trial.

Part of this I think shows that the defendant simply failed to accurately demonstrate that Mr. Uhle didn't have possession or access to the reports that are in dispute. And I think the multiple transfer of the file is one of the problems in this case.

I want to discuss a couple of the different documents addressed by counsel and a couple of the different items that Mr. Ellison indicates he didn't have [p. 16] beginning with his initial assertion, his original motion for new trial that he didn't have the affidavit for the search warrant for Mr. Purnall's residence. That search warrant was the subject of the hearings on the defendant's motion to compel the Government to unseal the first warrant heard on December 21st of 1990

THE COURT: Miss Martin.

MS. MARTIN: Yes.

THE COURT: We heard some static on here and I want to make sure that Mr. Ellison is still there.

Mr. Ellison, are you there?

MR. ELLISON: I'm still here, Your Honor.

THE COURT: Okay. And Mr. Diaz, are you there?

MR. DIAZ: Yes, I am.

THE COURT: All right. Go ahead. I'm sorry to interrupt you.

MS. MARTIN: Thank you, Your Honor.

The defendant initially contended he had not received copies of the affidavit and search warrant for the Purnall residence which were also the documents, pleadings and authority for that. And in fact in Exhibit No. 5 – Exhibit Supplement No. 5, excuse me, Exhibit 20 at page 34, it does reflect the fact that he received a copy of the August 9th, 1989 search warrant affidavit and search warrant which was incorporated into the later search [p. 17] warrant in December for the Purnall residence.

Exhibit 20 at page 34 also shows that Mr. Ellison received from Mr. Uhle a search warrant and affidavit for Mac which incorporated the earlier Jones search warrant into the documents. This is important because it is that Exhibit which describes a number of the items that defense counsel claims he did not have possession of prior to the trial. Including statements made by Linda Jones about Mary Flores, her husband or boyfriend Mac and her brother Joe. And in the context of the affidavit which was provided in accordance with this Court's order, and it's reflected as received by Mr. Ellison, Detective Poppendosen (ph) with Linda Jones told Deputy Coast (ph) that she and her husband got their cocaine from Joe who also sold to Charlene Grand and that Joe left Oregon to visit his parents in Mexico leaving her

sister Mary and her husband in charge of the cocaine distribution. Reflects that Linda got her cocaine at Joe's residence, reflects that Linda Jones said that Mary Max gave her 18 ounces of cocaine and that Mary was waiting for Norman Jones to bring money to Joe's house. The affidavit also describes telephone conversation in which Mary discusses payment for cocaine.

This all relates to items listed on page 8 of defendant's motion for dismissal, motion in support of [p. 18] habeas corpus position a motion to dismiss for governmental misconduct. These are all items listed on page 8 that defendants claim they did not receive notice of prior to trial. In fact, the description of those conversations were included in the search warrant that was provided to defendant prior to trial consistent with this Court's order.

At page 8 defendant also contends that he didn't receive information concerning the cocaine found in Ms. Flores' luggage, drug trafficking in her residence, firearms, et cetera. Yet again on Exhibit 20, page 34, he indicates that he received property custody reports in the execution of the search warrant which specifically list those items. And those were also part of the Government's response to defendant's original motion for new trial in Exhibit 1. They're provided there as well. Clearly received all of this information well in advance of trial.

Moving on to the report from the execution of the search warrant at the Purnall residence. It is clear from both the discussion at the pretrial motions on December 21st, 1990 before this Court as well as from the contents of the search warrant for defendant's person and storage locker that a search warrant had been executed at the

Purnall residence and that there was information derived from the execution of the search warrant. [p. 19] Defendant's copies of both search warrant and affidavit and the affidavit in support of the search warrant for the defendant's storage locker and person specifically refer to the content of Ms. Flores' – excuse me, with Detective Roberts on the date he said he accepted it. There was clear notice that that event had occurred from the search warrant affidavit that had been provided to the defendant in September of 1990.

It's his contention that he received no reports from Phillip Brant (ph) simply inadequate. Is inaccurate. And Defendant's Supplement Exhibit No. 5 demonstrates that.

And Exhibit 20, page 34, Mr. Ellison reflects that he received in addition to the search warrant affidavit the returns for the search warrant listing the items seized pursuant to the warrant as well as the custody report from Ms. Flores, documents relating to Ms. Flores' plea and sentencing were provided in-court, Mr. Uhle's prior in-court testimony.

One page of those materials, not all of them, but one page again perhaps indicating a problem in transferring files, is referenced on Defendant's Exhibit Supplement 20 at page 7.

As to the individual report listed by defendant as Exhibits 1 through 11 in the Exhibit [p. 20] Supplement to the Court for consideration of newly-discovered evidence. The defendant had access to all of these reports. It's documented in Mr. Uhle's affidavit and in the Defense Exhibit Supplement No. 5.

It isn't clear what materials Mr. Uhle did or did not copy from the state prosecution file which he subpoenaed. We know only from his affidavit that he found few if any materials relating to any agreement with Ms. Flores. This is consistent with the Government's position that there was no agreement with Ms. Flores.

Mr. Uhle's affidavit does not indicate that the reports that are listed in the defendant's supplemental motion as new reports were not in the file. That is nowhere contained in Mr. Uhle's affidavit. It's clear and I certainly would concede that Mr. Blackman did not have these reports because they became an issue only in the context of the argument that Mr. Blackman made December 12th of 1990 in which the Court ruled on in – on January 19th. Mr. Blackman was off the case shortly after that and I see no reason why he would have been involved in further pursuit of those documents. But Mr. Uhle certainly would have. And through his affidavit indicating that he subpoenaed the files as well as the prosecuting attorney for the case, and the prosecuting attorney who unsealed the affidavit, he certainly had all of those documents and [p. 21] records available to him in the manner in which the Government suggested he obtain those documents.

I don't know and it isn't clear from Mr. Uhle's affidavit whether or not he simply elected not to copy those records or whether he had difficulty obtaining them.

I do know that at no time did Mr. Uhle ever contact me to say that he had any difficulty obtaining reports from the District Attorney's file. And those would certainly be the reports that the search warrant from Mr. Diaz' – actually search warrant in person would indicate

would be within the files. Mr. – Detective Roberts' interview with Ms. Flores and reports concerning the execution of the search warrant. There was no indication at any time that there was any difficulty in obtaining any of those records.

For the defendant to suggest at this point that he was unaware of the report after the indication that the reports existed in the execution and for affidavit for the search warrant of Mr. Diaz' storage locker and person, and the discussion in the motion from December 12th, simply makes no sense. The Government's provided the quickest access possible given the pendency of the trial date at that time to the defendant, and apparently Mr. Uhle did in fact subpoena the file. After that there is no record of [p. 22] any difficuity in obtaining the report until this motion was filed.

It further is noted, as I mentioned earlier, much of the information contained in the specific reports 1 through 11 is included in the affidavit for the three search warrants which the defendant did obtain prior to trial.

The Government's obligation despite discovery is satisfied, provided the defense with an opportunity to inspect and copy documents. Mr. Uhle's affidavit indicates he had such an opportunity as well as an opportunity to speak with Deputy District Attorneys Dee Gustafson and Terry Zeelander. The Government didn't have a specific obligation to point out which documents from a file Mr. Uhle copied once he had subpoenaed the file.

I do want to move on to the two documents which do constitute newly-discovered evidence in the Government's opinion in this case. The earlier reports, 1 through 11, do not constitute newly-discovered evidence but the defendant certainly was aware they existed. The Government had provided access to them. And whether or not Mr. Uhle elected to copy them and use them or not is a matter that was clearly up to the defense, not up to the Government. If Mr. Uhle had notified the Government or the Court that there were problems in obtaining the discovery, [p. 23] that would be a different issue. But the Government provided access and there was no complaint heard about the availability of the records from the trial subpoenaed by Mr. Uhle.

The two documents that do constitute newly-discovered evidence are the initial report made by Deputy Lowe and the waiver form. The Government first learned as of February 1st, 1990 report by Deputy Lowe on June 15th of 1994, a USA F Supp report applying to another case. After reviewing the report I concluded it should have been provided at pretrial discovery and I provided it to the defense counsel and this Court on June 29th.

The reports document initial contact with law enforcement. And it was likely in my opinion that it simply overlooked when I asked the officers to provide discovery as the defendant's name is mentioned in the report only as Luis spelled L-u-i-s. And identified only as a cocaine customer of Jose Purnall. There isn't a more extensive identification of the defendant, and the Court's reference doesn't appear until page 2 of the report.

Nonetheless, that should have been provided and the Government concedes that. It does reflect that in late January of 1990 Ms. Flores' contact with the Clackamas County Sheriff's Office with information concerning an unrelated case, and in that initial contact she requested [p. 24] case consideration. The report reflects three different contacts. In the first two contacts she does not mention the defendant. There's no contact after the first contact does Miss Flores request case consideration.

Nevertheless, the Government concedes there is information to which the defendant was entitled during the course of the trial. The second document is a standard form waiver signed January 30th by Ms. Flores indicating that – especially a waiver of liability.

The real issue in my mind is the impact of those 2 documents upon the defendant's habeas corpus motion. Whether there should be – whether the Court can conclude that the statement made in the initial report that Maria Flores requested case consideration is sufficient to amount to a reasonable probability sufficient to undermine confidence in the action of this case.

If the Government's view that although this report simply should have been provided to the defendant, there is no reasonable probability that this indication alone would amount to a reasonable probability position to undermine the evidence – the evidence in the entire case.

There was ample evidence apart from the testimony of Ms. Flores. The defendant's conversations were tape recorded before Deputy Lowe. Law enforcement officers witnessed these things.

[p. 25] Deputy Spang (ph) and Detective Roberts both testified about the defendant's confession and the defendant's confession, of course, included not only his confession that he intended to purchase a kilogram of cocaine, it included his persistent involvement in selling cocaine since 1988 and his implication in cocaine trafficking of Mr. Sonavin and Mr. Deluca and Mr. Bourke (ph).

The civil reference to her request for case consideration for statements made simply doesn't amount to a probability sufficient to undermine confidence in the outcome of the proceeding. Nor – and I want to add this in too. Nor does the Government concede in any way that any of the reports offered by defendants in any way indicate that there was perjury committed by either Detective Roberts, Deputy Lowe or Ms. Flores.

Ms. Flores' testimony in this case has been consistent. She was consistent about not having received any benefit from the Government in her representation to this Court during defendant's trial and in the pretrial motions in the Bracamontes case.

I think that it's the defense's contention that she had been earlier involved in her brother's cocaine trafficking operation from statements made by other individuals. And while she could be impeached with those [p. 26] statements, they don't certainly amount to perjury on her part.

I do want to draw the Court's attention to a case which is not quite as recent as counsel's case which I think does have a bearing on the Court's analysis in this matter and that's *United States vs. Davis* at 960 F2d 820. It's a 1922 case. In *United States vs. Davis,* the defendants

were convicted of conspiring to possess cocaine, with intent to possess cocaine and using Federal communication facilities to facilitate conspiracy. The case was based in large part on the testimony of two undercover agents.

After the defendants' convictions the defendants learned that one of the two agents had been implicated in a conspiracy to steal confiscated drug money from the LA County Sheriff's Office, and that some of this conduct had occurred during a relevant part of the proceedings in the defendant's case. They moved for a new trial.

The Ninth Circuit noted that evidence impeaching a witness is not ordinarily material. At most it was provided to the trier of facts with a reasonable time to which this testimony not credible and ordinarily of course that's not grounds for a new trial. And that of course seemed to be the process we're in in this case.

[p. 27] However, the Court assumed that the newly-discovered impeachment evidence criminal activity by the agent might be sufficient to make a jury find the testimony incredible. The Court then considered what the impact on the case would be without an evidentiary hearing. The Court simply considered what the impact on the case would be. And found that there was sufficient evidence apart from the agent's testimony to permit a reasonable trier of facts to find the defendant guilty beyond a reasonable doubt.

The Court concluded, and this I think is the key part, the Court concluded that if there was sufficient evidence to support the conviction, even if the impeachment evidence destroyed the witness' testimony, the conviction should be upheld.

And if that was the case in the Davis case, the Ninth Circuit found the defendants had not demonstrated adequately that the newly-discovered evidence would properly produce an acquittal. And I think that that's the result that the Court should find in this case too. There is only one truly new piece of information in all of the documents that have been generated or provided to the Court by the defense. And that one piece of new information is that Maria Flores, whether she initially contacted the Sheriff's Office, initially made a request that she receive [p. 28] case consideration in exchange for providing information about significant cocaine traffickers. And I believe under the ruling in *Davis* the Court should consider whether that would have such an adverse impact on Ms. Flores' testimony that it would make all of her testimony incredible. And if the Court finds that's the case, then whether or not there is sufficient evidence apart from Ms. Flores' testimony to permit the Court to find that the jury found the defendant guilty beyond a reasonable doubt.

And in this case I think that that's amply demonstrated by the defendant's confession, by the testimony of the other witnesses in the case, by the tape recorded statements and by the observations of the officers who watched the transaction.

With regard to the Court's request for argument concerning evidentiary hearing. It would be the state's position there's no need for an evidentiary hearing in this case because the materials provided by the parties adequately document the defendant's access to these materials. In respect to the reports that defense counsel labeled 1 through 11, both the defense documents and the

Government's documents demonstrate that Mr. Uhle subpoenaed the file in which those reports were maintained. And both Mr. Ellison's Exhibit Supplement No. 5 and the Government's documents demonstrate that Mr. Uhle possessed the three [p. 29] search warrant affidavits which contains much of the same information that was contained in the report whether or not Mr. Uhle ever copied the report.

The parties also both raised that the defendant did not have two documents. Those being the initial report written by Deputy Lowe on February lst, 1990 and the court waiver form. That being the case, the Court I believe may decide this matter without the time and expense required for an evidentiary hearing where the sole issues to be resolved is whether Ms. Flores' request for case consideration amounts to a probability sufficient to undermine the absence of a trial. And I believe that *Shaw vs. United States* which is at 878 F2d 1156, a Ninth Circuit 1989 case, supports the view that the Court would be permitted to dispose of this person without the time and expense required for an evidentiary hearing.

And that's all I have at the moment, Your Honor.

THE COURT: All right. And Mr. Ellison, you may respond.

MR. ELLISON: Yes. Your Honor, Ms. Martin's comment that other individuals say that Ms. Flores was involved in her brother's cocaine activities would have minimal impact on her credibility. This regards of course Exhibit No. 5 which is Maria Flores' confession to the [p. 30] officers the evening of her arrest where she herself

admits that she was involved with numerous drug transactions prior to the evening of her arrest including amounts of drugs involved and money.

So her own confession, which was not used by the Government nor by the defense to impeach her or to deal with her false testimony, is the basis for the attack on her credibility. Not necessarily only with other persons, say, but her own confession which was tape recorded. So it's not just other folks, it is Ms. Flores herself.

And if the Government was aware of Ms. – and certainly law enforcement agents were aware of her confession. Roberts and Lowe were present when she made the confession which was tape recorded. We know the Government does tape record statements from defendants and suspects. That's Exhibit No. 5 in our Exhibit Supplement No. 4 that is a direct contradiction and impeachment which shows the fallacy of her testimony and of course that the agents permitted her to testify that way.

We must presume of course that the Government was aware of this statement. It would be preposterous to think the Government witness against Mr. Diaz would not have been reviewed by the prosecution prior to her testimony. In any event, certainly agents [sic] new about this.

[p. 31] Now, Miss Martin has alluded to some declaration by Mr. Uhle and –

THE COURT: Would you speak into the microphone a little bit.

MR. ELLISON: Yes.

THE COURT: Thank you.

MR. ELLISON: Have made some representations regarding Mr. Uhle's declaration. In Mr. Uhle's recent May 8th, 1995 declaration, he says – he says in the third paragraph, I subpoenaed the state prosecutor regarding the records in case file of Maria Flores. "Through this," and I'm quoting, "Through this effort little, if anything, was produced concerning Flores' efforts to cooperate with authorities." New paragraph. "Post-conviction release counsel Sherman Ellison had shown these documents and reports," parenthesis, "Exhibit Supplement 4" in parenthesis, "that had been produced after trial concerning Flores' involvement with drug trafficking and cooperation with members of the arresting agency ROCN." I emphasize in the next sentence. "I was not seen or was aware of most, if not all, of these materials during the Diaz trial."

That is a direct contradiction to what Ms. Martin has placed in her affidavit and what she has said to this Court right now. Of course Mr. Blackman similarly states, they took all of his discovery from the Diaz file, [p. 32] and we know Mr. Blackman is a gifted lawyer, it's [sic] seems to me is a Harvard grad, a Yale law school grad, seems like a wonderful man. He in this paragraph number – in his paragraph No. 2 states that after reviewing Supplement No. 4, Exhibit Supplement No. 4, that he prepared those documents in that Exhibit Supplement No. 4 with his file. None of these documents were among the materials in his file.

Thanks to Mr. Uhle had – similarly had the same assessment, and that is Paragraph Number 3. None of the documents appended to Exhibit Supplement No. 4 were

provided to me or known to me prior to my representation of Mr. Diaz. He's not saying that the Government didn't make them available to him. Mr. Blackman is a skilled lawyer. Here he was involved with Mr. Diaz for a number of months and has never been apprised by the Government of the existence of Maria Flores' confession or her special consent form acknowledging that she is going to assist the Government and testify against these persons that she is involved with, cooperating against the Government.

The *Davis* case is factually substantially inapposite to the defense of Mr. Diaz which was entrapment, and so the defense, as it relates to Ms. Flores and the attack on her credibility, is the critical issue in that case.

[p. 33] Interestingly, Ms. Martin makes reference to Mr. Diaz' purported confession. We see the Government has no problem tape recording statements from arrestees and suspects, yet this purported confession of Mr. Diaz was never recorded, and all we have are the credibility of Roberts and Steck (ph), if I remember correctly, saying that this is what he said which Mr. Diaz denied. And of course what do we have now to impeach these officers are these new reports that they withheld from the defense that both Mr. Uhle and Mr. Blackman state under penalty of perjury they weren't aware of and never had. And Mr. Uhle states in his declaration that when he subpoenaed these files there were none of these reports in the file.

Number two, we have had of course his investigator go into the court numerous times to look at the Flores file which is in affidavit before this Court, never was it in any of the previous files. As a matter of fact, it wasn't until

the Brachamontes case that the lawyers, Dan Feiner was the lawyer for Mr. Brachamontes in that case, was able to obtain those documents, not from the prosecutor but through a subpoena duces tecum of the probation officer's file. And that's where these documents came from.

So the Government never willingly turned over these materials on Ms. Flores. There is a substantial [p. 34] question of fact regarding the Brady material that must be developed by this Court and ruled upon by this Court. At this point you have substantial contradiction between Ms. Martin on the one hand and Mr. Blackman and Mr. Uhle on the other hand.

For the Government to say that they were aware of these reports and permit the witnesses to testify falsely, this is not just a Brady violation issue now, this is permitting false testimony to be presented to the jury. That is a view on a different level and a different bases [sic], it's not merely Brady. It's now presenting it for a jury's view.

The Government concedes that Exhibits 13 and 14 are newly discovered and needs to be debated. It doesn't want to deal with the – Mr. Roberts or, I don't recall, I think it was Mr. Roberts who testified.

Mr. Spang testified that there was a discussion between Ms. Gustafson and him at the time that Ms. Flores pled and she did provide this with Ms. Gustafson. A direct contradiction to the representations by the Government that there was no attempt to assist and benefit Ms. Flores for her cooperation against Mr. Diaz.

I'll look at my notes.

The Government's attempt to try to slough off this Brady violation with the change of attorneys is [p. 35] preposterous and inappropriate. Mr. Uhle testified through his declaration under penalty of perjury that he subpoenaed and/or reviewed the files that were brought to the Court, and that there was nothing in these files that relate to these reports or to a confession. And he states had he had Ms. Flores' confession he would have used that to attack her in these court proceedings. Obviously it was not there.

I'm not sure if the Court has any other specific areas that it wishes me to address but of course –

THE COURT: Okay. I think that the issues have been satisfactorily addressed and I'm not prepared to rule from, you know, at this point. I started to say from the bench. I'm in my chambers, I'm not prepared to rule from chambers. I will make a writing.

And I appreciate the thoroughness of both of your discussions and attention to this topic. So that concludes this hearing. And –

MS. MARTIN: This is Jennifer Martin.

THE COURT: Yes.

MS. MARTIN: I would like to make one correction and it's just a minor one to Mr. Ellison's argument.

I believe he indicates it was Deputy Spang who testified at the Brachamontes case. That is not [p. 36] correct. Mr. Ellison provided a transcript from Detective or Sergeant Randy Barry who was a defense witness in the case.

MR. ELLISON: That's fine. I think he was one of the officers.

THE COURT: All right. That concludes this hearing. We are in recess.

MS. MARTIN: Thank you, Your Honor.

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause.

/s/ Dennis R. Grube 7-6-95
DENNIS R. GRUBE DATE
Official Court Reporter

APPENDIX F

(SEAL)

U.S. Department of Justice

United States Attorney
District of Oregon

888 S.W. Fifth Avenue (503) 727-1000
Suite 1000
Portland, Oregon 97204-2024

June 29, 1994

Mr. Sherman Ellison
Attorney at Law
15203 Ventura Boulevard, 9th Floor
Sherman Oaks, CA 91403-3110

Re: United States v. Juan Louis Diaz

Dear Mr. Ellison:

Enclosed please find a six page special report by Clackamas County Sheriff's Deputy Kim Lowe dated February 1, 1990. I received a copy of this report for the first time after receiving your opening brief to the Ninth Circuit on the §2255 motion. AUSA Dick Scruggs discovered the report while coordinating discovery for another case in which Ms. Flores is a witness.

In September of 1990, I asked the Clackamas County Sheriff's Office to provide all reports concerning defendant Louis Diaz's case to me in order to provide discovery. In January of 1990, Ms. Flores provided the Clackamas County Sheriff's Office with information concerning Jose Yanez, an individual unrelated to the investigation involving defendant Louis Diaz. As the entire first

page of the report, and the majority of the information concerns Ms. Flores' knowledge of Jose Yanez's involvement in cocaine trafficking, it appears the officers inadvertently omitted this report when providing the government with copies of the other reports relating to defendant Louis Diaz's case. Unlike the other reports in this investigation, it is not immediately apparent that the report discussed your client. The only references to Mr. Diaz are on page two as the name "Luis", with some identifying information, and on page five as a cocaine customer of Jose Bernal.

Had I possessed the report in 1990 or known of its existence, it would have been provided as discovery. As I have only recently learned the report exists, I am providing you with a copy as soon as possible. Please understand that although I believe the defendant was entitled to the report, and that I would have provided the report had it been in my possession in 1990, I do not believe the report changes any material aspect of the case.

The report reflects Ms. Flores initially contacted the Clackamas County Sheriff's Office on January 26, 1990. At that time she requested case consideration for information concerning Jose Yanez. Although she made this request, the Clackamas County Sheriff's Office did not enter into any type of agreement with her in return for any information she provided. Ms. Flores did not disclose any knowledge of defendant Diaz during the initial conversation on January 26, 1990. The report reflects Ms. Flores spoke with Deputy Lowe again on January 27, 1990. During this second conversation, Ms. Flores disclosed additional information about Jose Yanez. Again, she made no mention of defendant nor did she renew any

discussion of an agreement in exchange for the information.

On January 30, 1990, Deputy Lowe and Detective Roberts met with Ms. Flores. It is during this third conversation that Ms. Flores briefly mentions "Luis" as one of her brother's cocaine customers. There was no further discussion or identification of defendant Louis Diaz until he contacted Ms. Flores requesting her to supply him with cocaine approximately two weeks later.

At no time did Ms. Flores ask for or receive any promises or any agreement from the Clackamas County Sheriff's Office or the Regional Organized Crime and Narcotics Task Force concerning her information or assistance in the investigation of defendant Diaz. By January 30, 1990, Ms. Flores knew the officers would not enter into an agreement. The testimony of Ms. Flores, Detective Roberts and Deputy Lowe all reflect that no promises or agreements were made to Ms. Flores in return for her information or assistance in this case. DDA Therese Gustafson and I both attested to the fact that there was no agreement concerning her charges in state court.

I will address this issue in my response to your brief. Because I believe you to be entitled to receive the report as soon as possible, I am sending the report and this letter to you before revising my brief to address its discovery.

Very truly yours,

Kris Rogers
United States Attorney
District of Oregon

/s/ Jennifer J. Martin
Jennifer J. Martin
Special Assistant
United States Attorney

cc: The Honorable Helen J. Frye
AUSA Leslie Baker
SAUSA John Hoover

APPENDIX G
CLACKAMAS COUNTY SHERIFF
SPECIAL REPORT

I-162

Feb. 1, 1990

CLASSIFICATION: INFORMATION

SUBJECT OF REPORT: MEETING WITH CONFIDENTIAL INFORMANT REGARDING MULTI KILOGRAM COCAINE DEALERS IN WASHINGTON, OREGON AND CALIFORNIA

REPORTING OFFICER: DEPUTY KIM LOWE

MENTIONED: DETECTIVE CRAIG ROBERTS
CCSO,SIU

SUSPECTS: YANEZ, JOSE
AKA'S: YANEZ, ALAMBERTO:
"CHINCHI"
DOB: 03-17-64
Hispanic male, 5'5", 145, black hair, brown hair, wears two earrings in left ear
????? Clara Street, Downey, California
Current Felony Warrant-U.S. Marshall's office
Cellular Phone #: 213-400-6217
Pager #: 213-913-5109

YANEZ, MERCEDES
unknown street address
Wenatchee, WA
Phone: 509-884-6970
Vehicle: Ford Bronco, Washington License 402AGU
White with gold stripe

VERDUZCO, RENA
AKA: "BLANCA"
lives with JOSE YANEZ in Downey, California and with JOSE YANEZ's parents in Wenatchee, Washington
Washington phone: 509-884-9650
Vehicle: 1990 Chevrolet Blazer
Blue in color

"EL TIGRE"
Hispanic male adult
lives in same apartment complex with JOSE YANEZ
Clara Street, Downey, California

JESUS (unknown last name)
AKA: "BARBAS"
Hispanic male adult
lives in Los Angeles, California area

"EL GORDO"
Hispanic male adult
Lives in Los Angeles, California area

BERNAL, JOSE TRINIDAD VALDEZ
DOB: 05-07-55
Currently residing in Mexico and Los Angeles areas
Last Known Address:
19205 S. South End Rd.
Oregon City, OR 97045
Phone: 656-5583

GARCIA, JOSE
currently in Federal custody for DCS-Cocaine

"JAY"
White male adult
Jose Garcia's partner

CARRILLO, ARTEMIO
Phone: 656-5353

GRAND, SHARLEEN LUDELLA
DOB: 10-12-54
4785 Chestnut, #7
West Linn, OR
Phone: 656-2963

JONES, NORMAN PAUL
DOB: 01-19-55
JONES, LINDA ANN
DOB: 01-20-49
15356 S. Carus Rd.
Beavercreek, OR 97004

"LUIS"
Hispanic male adult
lives in Oregon City
works for telephone company
Pager: 237-7935

"GLEN"
White male adult
lives in Clackamas area
Phone: 650-9328

"RON" and "DOROTHY"
Possible last name: CAPMAN
live south of Oregon City
Dorothy is a Clackamas County Judge's daughter
Phone: 631-7390 or 631-3059

NARRATIVE:

On 01-26-90 I received a telephone call from MARY FLORES who wished to provide me with information regarding some cocaine dealers. Ms. FLORES told me that she wanted to work with our department in exchange for consideration on the charges pending against her for D.C.S. in Clackamas County. Ms. FLORES also told me that she did not want her name revealed to the suspects in this investigation as she is fearful that the suspects would kill her if they found out about her dealings with the police.

Ms. FLORES told me that she knows a man by the name of JOSE YANEZ who is a multi-kilo cocaine dealer and that he is currently living in the Los Angeles California area. Ms. FLORES told me that JOSE YANEZ's wife, MERCEDES, and his three children are living in Wenatchee, Washington.

Ms. FLORES told me she called to let me know that MERCEDES YANEZ was currently at her home on South End Road. She said that MERCEDES had come to pick up a Ford Bronco which she claimed was hers. MERCEDES told Ms. FLORES that she was taking the Bronco back to Washington.

Ms. FLORES told me that she would obtain what information she could from Ms. YANEZ about her cocaine business. Ms. FLORES agreed to call me back with this information.

On 01-27-90 at 0930 hours Ms. FLORES again contacted me by telephone to provide the following information regarding JOSE and MERCEDES YANEZ.

Ms. FLORES said that Ms. YANEZ told her that JOSE YANEZ was busted in the spring or summer of 1989 for selling a large quantity of cocaine in the state of Washington. Ms. FLORES said that MERCEDES paid $50,000.00 cash to bail JOSE out of jail. She said that when JOSE went to court and found out he was facing 20 years in jail, he left the courthouse and did not come back. JOSE YANEZ then paid $10,000.00 cash to a female, known only as "IRENE", to drive him to California.

Ms. FLORES has learned from talking to her brother, JOSE BERNAL, and to MERCEDES YANEZ that JOSE YANEZ went to Mexico after absconding from the courthouse in Washington. Ms. FLORES said he went to Mexico to have plastic surgery to change his appearance. Ms. FLORES said that she saw JOSE YANEZ prior to his arrest in Washington and she also looked at a recent picture of JOSE YANEZ that MERCEDES had. Ms. FLORES said that JOSE YANEZ does not look that much different than he looked prior to the plastic surgery.

Ms. FLORES also learned that JOSE YANEZ is using the name of ALAMBERTO YANEZ and is living in the Los Angeles area in an apartment with his girlfriend, "RENA". She said that "RENA" also goes by the nickname of "BLANCA". Ms. FLORES said that "RENA" transports cocaine to the Wenatchee area for JOSE YANEZ.

Ms. FLORES said that JOSE YANEZ also has two other hispanic male adults who distribute cocaine for him. She said these two subjects live in the Los Angeles area and are also bodyguards for JOSE YANEZ. She knows them as "EL GORDO" and "BARBAS". Ms. FLORES said that

these are only nicknames and that "BARBAS"'s first name is JESUS. Ms. FLORES said that MERCEDES told her that "EL GORDO" and "BARBAS" distribute over 100 kilograms of cocaine per week.

Ms. FLORES learned in conversation with MERCEDES YANEZ that she is also selling approximately 100 kilograms of cocaine every week for her husband. Ms. YANEZ sells this cocaine in the Seattle, Washington area and avoids selling anything in Wenatchee because she believes the police are keeping an eye on her. Ms. FLORES provided me with the telephone number for MERCEDES YANEZ in Wenatchee and also with the JOSE YANEZ's cellular phone number and his pager number.

Ms. FLORES said MERCEDES told her that she sometimes purchases kilograms of cocaine from Dallas, Texas. She told Ms. FLORES that she can get a kilo of cocaine for $6,000.00 there and that she gets them from her husband, JOSE YANEZ, for $18,000.00. MERCEDES told Ms. FLORES that she in turn sells the kilo's for $21,000.00.

On 01-30-90 I contacted the Drug Enforcement Administration in Yakima, Washington in an attempt to obtain some intelligence information on the subjects Ms. FLORES had talked about. I spoke with Agent Jim Baldwin who is the case agent involved with JOSE and MERCEDES YANEZ. Agent Baldwin told me that they had arrested JOSE YANEZ for distribution of cocaine and that he was currently wanted by them. Mr. Baldwin told me that he also believed there was some type of reward offered for the capture of JOSE YANEZ. He told me that JOSE YANEZ was out on bail and that he did appear for his jury trial. After the jury went out to make their

decision, Mr. YANEZ walked out of the courtroom and never came back. Mr. Baldwin told me that they had been in contact with MERCEDES YANEZ in an attempt to locate JOSE YANEZ in the past.

On 01-30-90 at 1315 hours Detective ROBERTS and I met with MARY FLORES at her home in Oregon City at her request. Ms. FLORES told me that she had further information to provide us regarding this cocaine ring.

Ms. FLORES told me that she was residing in the San Diego, California area up until she came to visit her brother, JOSE BERNAL, on December 7, 1989. Ms. FLORES said she knew her brother was involved with the distribution of cocaine and wanted her to come to Oregon to be a "runner" for another cocaine dealer by the name of JOSE GARCIA. Ms. FLORES said that her brother asked her to do this for a two week period while he went to visit relatives in California. Ms. FLORES realized this was a quick way to make some money and decided to go see her brother. She said she went to JOSE BERNAL's home in Oregon City along with her boyfriend, MAXIMINO GALLARDO.

Ms. FLORES told me that after going to her brother's home, she discovered that JOSE BERNAL was a heavy cocaine user. She said JOSE would disappear for days at a time. Ms. FLORES told me that JOSE was not employed and that his "tile business" was not doing well. However, she said that JOSE always had a lot of money. Ms. FLORES told me that JOSE paid $28,000.00 cash for a brand new blue Ford pickup with a canopy just prior to going on vacation to California. She said he bought this truck from a local dealer on McLoughlin Blvd., possibly

Dee Thomason Ford in Gladstone. She said that he drove this truck to California when he left on December 15, 1989.

Ms. FLORES told me that, on December 10th, "RENA" arrived at her brother's home in a newer blue Chevrolet Blazer. She saw "RENA" carry two large suitcases into a bedroom of the home where she met with JOSE BERNAL. Ms. FLORES said that her brother told her that he had recently purchased the Chevrolet Blazer for "RENA" at a local Chevrolet dealer. She said that "RENA" was staying at the Valu Inn Motel in Oregon City during this trip to Oregon. Ms. FLORES said that she saw her brother, and "RENA" in the bedroom with the suitcases open and that there appeared to be several kilograms of cocaine in the suitcases.

Ms. FLORES told me that later on that same day, "BARBAS" came to her brother's home driving a newer maroon Ford Thunderbird. He wanted to leave the car at JOSE's house and JOSE told him to park it out on South End Road instead, which he did. Ms. FLORES told me that this is the car the Clackamas County Sheriff's office seized from alongside the roadway and that we had discovered a large amount of cocaine in the trunk of this vehicle. Ms. FLORES believes that "BARBAS" purchased this vehicle in California for the purpose or transporting cocaine from California to Oregon. (See CCSO Case #89-60575)

Ms. FLORES told me that JOSE BERNAL introduced her to JOSE GARCIA and JOSE GARCIA's partner, "JAY". JOSE BERNAL told Ms. FLORES that GARCIA and would supply her with cocaine while he was away in California.

JOSE BERNAL then gave Ms. FLORES the names and phone numbers of his cocaine customers and instructed her to sell cocaine to them. These customers were NORMAN and LINDA JONES, SHARLEEN GRAND. "RON" and "DOROTHY", "GLEN", ARTEMIO CARILLO, and "LUIS".

On one occasion JOSE BERNAL took Ms. FLORES to NORMAN and LINDA JONES home in Beavercreek and told her that would be one of her delivery points. Mr. BERNAL also showed Ms. FLORES how to "cut" several ounces of cocaine to make more product in order to make a larger profit on the cocaine. He instructed Ms. FLORES to charge $800.00 for an ounce of cocaine. When Mr. BERNAL left on December 15th, he left 4 ounces of cocaine with Ms. FLORES. He told Ms. FLORES to sell 2 of the ounces to SHARLEEN GRAND and that the other 2 were for either "RON" or for NORMAN JONES".

Ms. FLORES told me that "JAY" delivered cocaine to her when she ran out of product to sell. She said the largest amount of cocaine he brought to JOSE's home, at one time, for her was 10 ounces.

Ms. FLORES said she was on her way to deliver 9 ounces of cocaine to SHARLEE GRAND on the night we stopped and arrested her (12-29-89). Ms. FLORES said that she usually met people to make deliveries and that they did not come to JOSE's home to pick up cocaine.

Investigation continuing.

/s/ Kim Lowe
KIM LOWE/DEPUTY/17149

APPENDIX H

SPECIAL CONSENT FORM

I, Maria B. Flores, hereby agree to assist the Clackamas Co. Sheriff Dept., in the investigation of the criminal violations occurring in Washington, Oregon, Texas & California. I hereby release and acquit this agency, their officers, agents and employees from any injury or liability which I may suffer or sustain in the future as a result of these investigations. I am fully aware that I may have to testify in future court proceedings concerning cases in which I might participate. I have entered into this agreement freely and without duress. I fully understand that I am not to participate in any investigations of any criminal activities unless the investigation is being directly supervised by a sworn member of this agency. I agree to follow the instructions of the supervising officer while assisting in such investigations. I agree that any compensation paid me with respect to any services rendered by me in connection with any such investigation shall be the full and complete payment for those services. I shall have no other or further claim against the above mentioned agency in connection with such services.

/s/ Kim Lowe 1/30/90 — /s/ Mary B. Flores
(WITNESS) (DATE) — (SIGNATURE)

/s/ Craig Roberts 1/30/90 — 1/30/90
(WITNESS) (DATE) — DATE

APPENDIX I

CLACKAMAS COUNTY SHERIFF

Case Number 89-41531
Classification DELIVERY OF CONTROLLED SUBSTANCE (COCAINE) POSSESSION CONTROLLED SUBSTANCE (COCAINE)

Name of Person Giving Statement	Sex	Race	DOB
MARY B. FLORES	F	H	3-16-61

Residing Address 19205 S. End Road, Oregon City, Oregon 97045
Statement Taken By: Detective CRAIG ROBERTS DPBT#11055
Date: 12-29-89 From: 10:45 p.m. To: 11:17 p.m.
Location: Clackamas County Sheriff's Office

Q. Okay. The date is 12-29-89. It's Friday. It's 10:54 p.m., and present with me is a Hispanic female adult, and can you spell your last name for me?

A. FLORES – F L O R E S.

Q. And, your first name?

A. MARY.

Q. MARY? And, what's your middle name MARY?

A. Middle name is B.

Q. B?

A. Mmhmm (yes).

Q. Just the letter B?

A. Mmhmm (yes).

Q. Okay, and what is your date of birth?

A. 3-16-50, '61.

Q. 3-15.

A. No, 16, '50, '61. 3-16-'61.

Q. Very good. And, how tall are you?

A. Five one.

Q. And, how much do you weigh?

A. 120.

Q. And, what color eyes do you have?

A. Brown.

Q. And, you have

A. Brown.

Q. Brown hair and medium length hair. Uh, what is your Social Security number?

A. Shoot, I don't know.

Q. You do not know it?

A. No.

Q. Okay. Do you have an Oregon driver's license?

A. No.

Q. Do you have a driver's license in any State?

A. Yes, California.

Q. California driver's license?

A. Yes.

Q. Okay. Uh,

(Tape is turned off and then on)

Q. Okay. I had to stop the tape for a short time. It's 11:02 now. And, uh, when we effected a traffic stop on you in your, in the Blazer,

A. Mmhmm (yes).

Q. in Oregon City, I both advised you of your Miranda rights and I obtained a consent to search. Do you remember me reading you those cards?

A. Yes.

Q. Okay. I read you these rights and I'm going to read them again, and you acknowledge whether or not these were the rights that I read to you and if you do, in fact, understand them. You have the right to remain silent. Anything you say can and will be used against you in court. You have the right to consult a lawyer before any questioning and have a lawyer present during any questioning. If you desire a lawyer and cannot afford one, a lawyer will be appointed for you at public expense. Anything you say must be freely and voluntarily said. Do you understand these rights?

A. Yes.

Q. And, did you have any questions about those rights?

A. No.

Q. Okay. I also read a consent to search card to you and it reads as follows:

> Having been fully informed of my right not to have a search made of my person, property or premises without a search warrant being first obtained and of my right to refuse to consent to any search of my person, property or premises, I do hereby freely voluntarily and knowingly without threat or promise by any person, authorize and consent to a search of my person, property or premises. Do you remember me reading you that?

A. Yes.

Q. And, did you understand that?

A. Yes.

Q. Okay. Uh, inside, uh, and you did consent to the search of your vehicle?

A. Yes.

Q. And, person. Correct?

A. Yes.

Q. Okay. On your inside coat pocket, uh, there were nine plastic baggies containing white powder, and that is cocaine. Is that correct?

A. Yes.

Q. Okay. And, uh, can you tell me where you left from when, uh, you had that cocaine?

A. Where I had left from?

Q. Yeah. Where you began with that cocaine.

A. From my house.

Q. And, you live where?

A. South End.

Q. Okay. What's the address there?

A. Uh, I don't know. I don't really know.

Q. It is by South End High, Grade School? Is there a grade school across the street?

A. No, not across. It's,

Q. Kitty-corner though, kind of?

A. Yeah.

Q. Okay. And, the driveway leading up to the house, can you describe it? Is there a, a Western style post at the very front like you drive through a center of two posts? Is that correct?

A. Yes.

Q. Okay. So, you left that house on South End road and you were going where?

A. Out to the store to meet a girl.

Q. Okay, the Plaid Pantry store?

A. Yes.

Q. At Warner-Milne?

A. Mmhmm (yes).

Q. Okay. And, you were going to meet a girl by the name of who?

A. Uh, I don't know her name.

Q. Okay.

A. They don't give me a name.

Q. Okay, but you were going to meet a girl there and you were going to sell her all these?

A. Yes.

Q. Okay. And, how much money was she supposed to pay for that cocaine?

A. Sixty five.

Q. Sixty five hundred dollars?

A. Yeah.

Q. Six thousand, five hundred dollars? Okay. And, then you were going to return back to your house on South End road?

A. Uh, and yeah, and tomorrow I was going to deliver the money tonight.

Q. Oh, and tomorrow you'd take the money? Okay. And, the guy being the person that resides at the house on South End?

A. What?

Q. That you were going to give the money to?

A. No, no, no. He doesn't live there.

Q. Okay.

A. He lives in Portland.

Q. Okay. Uh, for delivering this cocaine, you were going to receive how much money?

A. Well, working for a base, whatever, he meets me, I was going to get two thousand dollars is for a week.

Q. Okay, so you get two thousand dollars a week for doing the deliveries?

A. Yes.

Q. Okay. And, you told me, though, you've only worked for him for two days.

A. Two days.

Q. So, have you received that two thousand yet?

A. Not yet.

Q. Okay. Alright. Uh, whose Blazer is that? The truck you were driving.

A. Whose Blazer?

Q. Yes.

A. I bought it. I bought the Blazer, uh, from uh, this guy.

Q. Okay. Who did you buy it from? Do you know his name?

A. The, the guy?

Q. In Portland?

A. Yes.

Q. Okay, and what is his name?

A. GARCIA.

Q. GARCIA?

A. Yeah.

Q. What's his last name?

A. That's his last name.

Q. What is his first name?

A. First name, uh, they call him a lot of names.

Q. But, you only know him as GARCIA?

A. Yeah.

Q. Okay. So, you bought that truck from him?

A. Mmhmm (yes).

Q. For how much?

A. I was going to pay it with work.

Q. Oh, with work?

A. Yeah.

Q. What was the total amount you were going to have to pay? Do you know?

A. Five thousand dollars.

Q. Five thousand dollars. So, that basically would have taken just over two weeks to pay off.

A. Mmhmm (yes).

Q. Did he tell you anything when doing these deliveries of cocaine for him, did he tell you what to do or can you tell me about that at all?

A. What to do, what?

Q. Well, you explained earlier that uh, uh, he said the people you were delivering to were nice people?

A. Yeah. I wasn't going to work with, you know, dangerous people like. Only, you know, nice people.

Q. Mmhmm (yes).

A. They don't do like,

Q. Mmhmm (yes).

A. They don't work any. You know, they don't work, uh, have any guns or anything and that.

Q. Mmhmm (yes). Uh, and you've been to this house on, in Portland,

A. Mmhmm (yes).

Q. where this GARCIA lives?

A. Mmhmm (yes).

Q. And, you've seen quantities of cocaine at his house. Is that correct?

A. Yes.

Q. What is the largest amount of cocaine you have seen at his house?

A. Well, twenty keys.

Q. Twenty kilograms?

A. Yeah.

Q. Okay. And, when was that?

A. Uh, let's see, about two months ago.

Q. About two months ago? Okay. When was the last time you saw cocaine at the house?

A. Last night, this morning.

Q. This morning?

A. This morning.

Q. How much did you see?

A. Mm, shoot, not too much because he doesn't have only what he's going to give to, you know.

Q. How much did you see?

A. About two, two kilos.

Q. Two, two kilos?

A. Mmhmm (yes).

Q. Okay. Uh, but you told me he also keeps his, uh, cocaine somewhere else.

A. Yes. It got used up because he knows people that will kill me. Okay?

Q. Okay. Well, this conversation is taped and you know that. Okay?

A. Yes.

Q. Okay. If there's a question you don't want to answer, you can just tell me no. Okay?

A. Alright.

Q. Okay. Okay. What kind of car does GARCIA drive?

A. (Silent)

Q. You do not know?

A. (Silent)

Q. Okay. Uh, how about the individual out on South End road where, uh, you came from? Your boyfriend lives there, right? And, what is his name?

A. MAX

Q. MAX?

A. Mmhmm (yes).

Q. And, is MAX involved in this at all?

* * *

Q. Did he know what you were doing tonight?

A. No.

Q. Okay. How about, who else lives there at the house?

A. Uh, who else?

Q. Mmhmm (yes).

A. Well, that ranch belongs to my dad.

Q. That ranch belongs to your dad?

A. Yeah.

Q. What is his involvement?

A. No. He doesn't. He lives in, uh, Mexico. He's not.

Q. He's not at the house? Your dad?

A. No. He was supposed to come, but I don't know if he's, I don't know because he went to spend Christmas over there and he comes and they see him, you know, and the ranch again, he goes back.

Q. He's not involved in this at all?

A. No.

Q. Not at all?

A. No. He doesn't even know that I'm into buying this.

Q. Okay.

A. Shoot, no.

Q. He would probably be upset. Do you think he's be upset with you?

A. He's going to kill me when he finds out.

Q. Okay. Who else lives out at that house?

A. That's it. Nobody else.

Q. Okay. Okay. Uh, you also made a delivery to some people in Beavercreek. Is that right?

A. Uh, not, if you tell me their names. Then, I tell you. Okay? Uh,

Q. Tell me the names.

A. Yeah. I, I meet them in uh, I meet them in the store. Okay? So, they, you tell me. Because, I don't know the, you know, I sometimes,

Q. What kind of car did they come in? Do you remember that?

A. A Camero. I believe Camero.

Q. Camero?

A. (Inaudible) Yeah.

Q. How much did you sell them?

A. Mm, forty two hundred.

Q. Forty two hundred dollars?

A. Yes.

Q. Okay. Did you make any other sales today?

A. No.

Q. Yesterday?

A. Uh, yesterday, yes.

Q. How many?

A. Uh, one. Only one.

Q. And, how much was that for?

A. Uh, twenty four hundred.

Q. And, where was that at?

A. Uh, uh, I think maybe uh, Leong's, Leant's restaurant?

Q. Lentz Restaurant?

A. Yes.

Q. In Oregon City?

A. Yes.

Q. Okay. Uh, and each of those times you were driving the

* * *

Q. Okay. You don't carry a gun?

A. Oh, shoot, no.

Q. Do you own a gun?

A. No.

Q. Okay. Uh, uh, the time is 11:17 p.m. and uh, I'm going to end our interview right now. Do you have any questions?

A. No.

Q. Okay. Thank you.

/s/ Craig Roberts
CRAIG ROBERTS, Det./11855/dec

APPENDIX J

State of Oregon)
) ss. AFFIDAVIT OF
County of Multnomah) JENNIFER J. MARTIN

I, Jennifer J. Martin, being duly sworn, depose and say:

I am an attorney in good standing in the state of Oregon. I am a Special Assistant United States Attorney, and acted on behalf of the government in the case of United States of America v. Louis Juan Diaz.

I am professionally acquainted with both Mr. Blackman and Mr. Uhle. Both individuals are well respected members of the Oregon legal community.

I learned for the first time in reviewing Mr. Blackman's affidavit and Mr. Uhle's affidavit that neither attorney recalls possessing the arrest reports relating to Ms. Flores. I believe the government provided adequate access to the materials in providing copies of the sealed search warrant and affidavit, and in advising defense counsel's office of the location of the reports which were not under seal.

Although it is very difficult to reconstruct the events which occurred four years ago, I believe the real problem may lie in the fact that the communications about this discovery occurred near the time defendant elected to change legal counsel. The court's order was issued January 19, 1991. Mr. Blackman withdrew as legal counsel, and Mr. Uhle substituted as legal counsel on January 22, 1991.

Throughout all pretrial and trial hearings in this matter, both parties were aware Ms. Flores had been arrested for possessing nine ounces of cocaine, that she was interviewed by Detective Roberts after her arrest, and that a search warrant was executed at her brother's residence. Ms. Flores' arrest and her interview with Detective Roberts were also referenced in the search warrant affidavit for defendant's storage locker, which was provided in the government's first response to defendant's request for discovery on August 19, 1990.

On January 16, 1991, the court granted defendant's motion to unseal records. Upon receipt of the order, I directed Detective Craig Roberts to send the unsealed documents to Mr. Blackman. He did so, and attested to this fact in an affidavit filed earlier with this court. A copy of his affidavit is attached.

I recall at the time of the hearing on the motion to unseal documents, that I believed defendant possessed one or more of the reports which had not been sealed, and was missing only those records sealed by the court because Ms. Flores' custody report was attached to the motion to unseal the records. The custody report reflects the Clackamas County Sheriff's Office report number 89-41531. Although my specific recollection is not good after four years, I believe I telephoned defense counsel's office about the documents which were not sealed. While I do not recall speaking with either Mr. Blackman or Mr. Uhle, or which of the two office I called, I believe I left a message with a staff person that any additional reports needed from the arrest could be obtained from Clackamas County. I recall leaving this message because I thought it was unlikely the defendant would need any other

reports, as it was my impression he was missing only the documents which had been sealed by court order, and sent to him by Detective Roberts. As I did not have the arrest reports in my possession, I referred defense counsel to the location from which the reports could most easily be obtained, i.e. the Clackamas County District Attorney's Office.

I know from speaking with Chief Deputy Dennis Miller of the Clackamas County District Attorney's Office that copies of the arrest reports, interview reports and other documents in Ms. Flores' file would have been provided for a defense counsel in a parallel or related criminal proceeding for the cost of copying the documents. The documents would have been available upon the request of the defense counsel in a related proceeding, or in response to a subpoena for the file. I know from Mr. Uhle's affidavit that he subpoenaed the file for Ms. Flores' from the Clackamas County District Attorney's Office, and received reports.

I do not recall any further discussion of reports relating to Ms. Flores' arrest before defendant's trial in March of 1991. I believed all issues concerning the sealed search warrant and affidavit, as well as documents which had not been under seal had bene [sic] resolved by providing the sealed documents to defendant, and by leaving a message advising that the other reports were available from Clackamas County.

I know from past experience that neither Ms. Blackman nor Mr. Uhle are reticent to discuss discovery problems with me or the not, nor were they in this case. Neither contacted me about any problems in obtaining

the reports related to Ms. Flores' arrest following the court's order of January 19, 1991. Until I reviewed their affidavits in the most recent materials submitted by Mr. Ellison, I was not aware of any problems with the availability of the reports or any dispute about whether the defense had the Flores' arrest reports.

I do not recall discussing Ms. Flores' unsealed search warrant, affidavit or the arrest reports with Mr. Uhle after he was retained. As he states in his affidavit, he did ask for any cooperation agreements with Ms. Flores. I advised him there was no agreement between Ms. Flores and the government, and accordingly, no documents of any such agreement.

On June 15, 1994, I learned for the first time, of the existence of a report which referred to an initial request by Ms. Flores to receive case consideration in exchange for information about cocaine traffickers. Defendant Diaz was identified in this initial report by his first name, his pager number and his employment. He was not the main subject of the report. AUSA Dick Scruggs contacted me about the report because he was aware of this case.

I spoke with AUSA Scruggs as well as AUSA Leslie Baker and AUSA Frank Noonan, and sent a copy of the report to defense counsel, this court, Mr. Blackman and Mr. Uhle. I would have provided the report in pretrial discovery, had I known of its existence at that time. I did provide the report soon after I became aware of it.

Throughout this case, there was strong evidence of defendant's extensive involvement in cocaine trafficking, evidence of his continuing desire to participate in cocaine trafficking and evidence of his continuing ties with other

cocaine trafficker. In addition, defendant Diaz gave a very detailed confession about his past activities and his intention to purchase cocaine from undercover officer Lowe.

Subscribed and sworn to before me on March 16, 1995.

/s/ Jennifer J. Martin
Jennifer J. Martin
Special Assistant
United States Attorney

(SEAL) OFFICIAL SEAL
KAREN L. KLEVER
NOTARY PUBLIC-
OREGON
COMMISSION NO. 024091
MY COMMISSION EXPIRES
APRIL 27, 1997

/s/ Karen L. Klever
NOTARY PUBLIC FOR
OREGON
My commission
expires: 4-27-97

APPENDIX K

Law Offices of Sherman M. Ellison
By: Sherman M. Ellison, Esq.
California State Bar No.: 45102
15303 Ventura Boulevard, 9th Floor
Sherman Oaks, California 91403-3110
Telephone: (818) 994-8888
Facsimile: (818) 780-8989

Attorney for Defendant
LOUS JUAN DIAZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LOUIS JUAN DIAZ, Petitioner, v. UNITED STATES OF AMERICA Respondent.	)	Case No. CV-93-01252-FR [C. A. No. 94-35161] AFFIDAVIT OF MARC D. BLACKMAN

STATE OF OREGON)
) ss.
County of Multnomah)

I, MARC D. BLACKMAN, being first duly sworn, do hereby depose and say that:

1. I am a member of the law firm of Ransom, Blackman & Weil. I am admitted to practice in the State of Oregon and the United States District Court for the District of Oregon. My firm and I represented Louis Diaz from approximately August 1, 1990 until approximately January 22, 1991 in the case commonly known as *United*

States of America v. Louis Diaz, United States District Court for the District of Oregon Case No. CR 90-203 FR.

2. On March 1, 1995 I received from Sherman Ellison a document filed in the above-captioned case entitled ***"Exhibit Supplement #-4* Re: Motion Requesting the District Court's Willingness to consider Newly Discovered Evidence."** Twelve documents were appended to this Exhibit. I subsequently compared these documents to the materials in my file concerning Mr. Diaz. I believe that file still contains copies of all discovery I received from the government during my firm's representation of Mr. Diaz. None of these documents was among the materials in my file. In addition, I confirmed that on January 23, 1991 I transmitted by letter copies of all discovery I had received from the government to William Uhle, who formally replaced my firm as counsel for Mr. Diaz on January 22, 1991. It is my understanding that Mr. Uhle has also reviewed the documents appended to Exhibit Supplement #-4 and recalls never seeing or being aware of most, if not all, of them during the course of his representation of Mr. Diaz. I further understand that Mr. Ellison is in possession of Mr. Uhle's entire file. Mr. Ellison has informed me that he has reviewed that file in its entirety and that none of these documents are in it.

3. Based on the above, it is my belief and I hereby represent that none of the documents appended to Exhibit Supplement #-4 were provided to me or known to my firm during the course of our representation of Mr. Diaz and that the government did not produce them in discovery while we represented Mr. Diaz.

DATED this 9 day of March, 1995.

/s/ Marc D. Blackman
MARC D. BLACKMAN

SUBSCRIBED AND SWORN to before me this 9th day of March, 1995.

/s/ Mary Theresa Schaeffer
Notary Public for Oregon
My Commission Expires: 7-18-95

[SEAL] OFFICAL SEAL
MARY THERESA SCHAEFFER
NOTARY PUBLIC - OREGON
COMMISSION NO. A008293
MY COMMISSION EXPIRES JULY 18, 1995

APPENDIX L

STATE OF OREGON)
) ss:
COUNTY OF MULTNOMAH)

I, WILLIAM UHLE, being first duly sworn, depose and say:

I was the trial attorney for Louis Juan Diaz in U.S. v. Diaz, No. CR 90-203-FR.

The primary defense in this case was entrapment. The defense turned on the factual issue of who initiated the communications between the government witness-Maria Flores and defendant Diaz from December 30, when she as arrested for distribution of nine ounces of cocaine, and February 14, when Ms. Flores started recording the telephone conversations. The position of the defense was that between December 30 and February 14, Ms. Flores entrapped defendant and began recording the conversations after the defendant was "sold" on the idea of purchasing cocaine from her.

The success of this defense depended upon being able to impeach the credibility of Flores' testimony with promises the government had made her in return for her cooperation. I demanded this information in discovery; I asked for it from Assistant U.S. Attorney, Jennifer Martin; I have not read the transcript, but I believe I asked government agents Lowe and Roberts for all that they had promised Maria Flores for her cooperation. I also had my investigator, William Driver, search the records of the Clackamas County court for this information. In addition, I subpoenaed the state prosecutor regarding the records

and case file on Maria Flores. Through these efforts little, if anything, was produced concerning Flores' agreement to cooperate with authorities.

Post-conviction relief counsel Sherman Ellison has shown me documents and reports (Exhibit Supp 4) that have been produced after the trial concerning Flores' involvement with drug trafficking and cooperation with members of the arresting agency, ROCN. I have not seen and was unaware of most, if not all, of this material during the Diaz trial. It has been approximately four years since I tried this case and Mr. Ellison has my entire file. My memory is not exact, but I do know that, if I had had some of this material in my possession, I would have used it during the cross examination of Flores, Lowe and Roberts.

/s/ William Uhle
WILLIAM UHLE

SUBSCRIBED AND SWORN TO before me March 8, 1995.

/s/ L. Dianne Denhem
Notary Public for Oregon
My commission expires 8-26-98

[SEAL] OFFICIAL SEAL
L. DIANNE DENHEM
NOTARY PUBLIC - OREGON
COMMISSION NO. 034785
MY COMMISSION EXPIRES AUG. 26, 1998

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. LOUIS JUAN DIAZ, Defendant.	No. CR 90-203-FR CV 93-1252-FR AFFIDAVIT OF CHARLES D. WEISSELBERG

State of California)
) ss
County of Los Angeles)

I, Charles D. Weisselberg, being first duly sworn on oath, depose and say:

1. I am a clinical professor of law at the University of Southern California Law Center. I have been asked by counsel for Mr. Diaz to state my opinions regarding the actions of defense and prosecution counsel in this case. With respect to claims of ineffective assistance of counsel, I have been asked to assess whether counsel's actions fell below an objective standard of reasonableness and whether counsel's actions prejudiced the outcome of the trial. *See Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984). In this affidavit, I have addressed the primary issues, as I see them. Any omission of issues should not be taken as evidence that those issues either have or do not have merit.

A. Affiant's Background and Training

2. I am a 1982 graduate of the University of Chicago Law School. From 1982 to 1984, I was in private practice. From 1984 to 1985, I served as clinical fellow and staff attorney at the University of Chicago Law School, where I taught litigation methods and supervised students with cases. From 1985 to 1987, I was a trial attorney with Federal Defenders of San Diego, Inc. I have taught at the University of Southern California Law Center since 1987.

3. I teach a variety of subjects at the University of Southern California. My primary responsibility is teaching in the Law Center's Post-Conviction Justice Project, a program that provides legal assistance mostly to federal inmates under a contract with the Federal Bureau of Prisons. Through the Project, my students and I represent inmates in a variety of matters, including motions under 28 U.S.C. § 2255, administrative proceedings, habeas corpus petitions, immigration cases, parole hearings, federal appeals and other cases. I regularly evaluate post-conviction claims for clients. As part of the Project, I co-teach a seminar every fall on habeas corpus and other post-conviction remedies. I have also taught Trial Advocacy on a regular basis (5 of the last 6 years). In Spring 1994, I will teach the basic course in Criminal Procedure.

4. I have written in areas of criminal law and federal practice. I have also served as a consultant to the Federal Courts Study Committee (1989-90), and as a member of various bar, judicial conference and professional groups and committees. I also regularly assist in placing the views of professional groups before the U.S.

Supreme Court and other courts, primarily on topics that affect the practice of criminal law.

5. I am a member of the bars of California, Illinois, the United States Supreme Court, the United States Courts of Appeals for the Third, Sixth, Seventh, Ninth and Tenth Circuits, and the United States District Courts for all California Districts and for the Northern District of Illinois.

6. A copy of my resume is attached as an exhibit to this affidavit.

B. Preparation

7. Before preparing this affidavit, I reviewed the following materials from Mr. Diaz's trial and post-conviction proceedings: the pleadings, exhibits and court's ruling on Mr. Diaz's new trial motion; the pleadings and exhibits filed for the § 2255 motion (including the government's response and exhibits); portions of the trial transcripts (especially the opening statements, closing arguments, jury instructions, and testimony of Maria Flores, Craig Roberts, Kim Lowe, Randy Spang, Donald Burke, Louis Diaz, Brian Diaz, Raynold DeLuca, and William Sonnabend); the briefs and opinion on Mr. Diaz's direct appeal; and the transcript of the hearing on Mr. Diaz's pretrial motions.

8. The opinions set forth in this affidavit are based upon my review of these documents. In this affidavit, I have endeavored to cite to portions of the record, briefs and authorities that help form the bases for my opinions and conclusions.

C. Issues Concerning The Prosecution's Disclosure of Evidence

9. Among the issues raised in this § 2255 motion is the question whether the prosecution fully disclosed any assistance that may have been given to Maria Flores. As set out in more detail below, in my opinion, the jury did not have an adequate understanding of the nature of her assistance to the government, and thus the jury did not have sufficient information with which to assess her credibility and motivation. It appears from the record that Mr. Diaz's trial counsel, Mr. Uhle, was not provided certain facts about Ms. Flores that would have been extremely important in impeaching her and in defending the case.

10. Maria Flores was one of the government's most important witnesses. Ms. Flores was the government's key witness with respect to the early contacts with Mr. Diaz, and with respect to Mr. Diaz's alleged relationship with Ms. Flores' brother, Jose Bernal. Mr. Diaz presented the defense of entrapment. He supported the defense with the testimony of numerous character witnesses. Ms. Flores' testimony was particularly critical if the government was to rebut Mr. Diaz's testimony about lack of predisposition, an element of the defense of entrapment. Maria Flores' testimony was emphasized at trial. Government counsel began her opening statement with a discussion of Ms. Flores' role. *See* Reporter's Trial Transcript ("RT") at 6. Counsel also discussed Ms. Flores during the beginning of her closing argument, *see id.* at 542-46, and during her rebuttal closing. *Id.* at 622-26.

11. I understand that on December 29, 1989, Ms. Flores was arrested with nine ounces of cocaine. *See State*

v. Flores, No. 90-1179, Transcript of Proceedings, Diaz's Ex. C, at 7-8. On March 13, 1991, Ms. Flores pleaded guilty to possession of a controlled substance (cocaine) in Clackamas County Circuit Court. *Id.* at 3. Ms. Flores' plea and sentencing apparently took place at 9:00 in the morning. *Id.* at 1. She received a probationary sentence of eighteen months. *Id.* at 9. The sentence was based upon the district attorney's recommendation. *Id.* at 3, 6.

12. Ms. Flores testified that same day in Mr. Diaz's federal trial (her testimony began shortly before the noon recess). RT at 196. According to government counsel, "[a] copy of Ms. Flores' conviction was provided to defendant at the time of trial prior to cross-examination." *See* Government's Response to Defendant's Motion For A New Trial at 13. I understand that government counsel did not disclose any additional documents or information about Ms. Flores' criminal case. *See* Government's Response to Section 2255 Motion at 19 (arguing that there is no duty to disclose "court orders, criminal calendars, and other unrelated matters"); Memorandum of Law in Support of Habeas Corpus Petition at 19-20; Affidavit of William Uhle, Diaz's Ex. X, dated May 8, 1991, at 2. Government counsel has stated that no agreement was made with Ms. Flores in exchange for her cooperation and testimony. *See* Affidavit of Jennifer J. Martin, Gov't's Ex. 14, dated December 6, 1993, at para. 3; Affidavit of Jennifer J. Martin, Gov't's Ex. 3, dated July 2, 1993, at para. 5.

13. At Mr. Diaz's trial, Mr. Uhle cross-examined Ms. Flores about her state conviction. On cross-examination, Ms. Flores testified that the police gave her a ride to court, but did not help her with her criminal case. RT at 222. When asked, specifically, "Did the police help you

with this [case]?", she answered, "No." *Id.* She also testified that she did not hire a lawyer because she did not have funds, and it would cost her $ 500 to hire the lawyer who was there. *Id.* at 222-23.

14. The transcript of Ms. Flores' state plea contradicts Ms. Flores' testimony in Mr. Diaz's trial. In the state proceeding, Ms. Flores acknowledged that she was being assisted by a police officer, who was present in court. *See State v. Flores*, No. 90-1179, Transcript of Proceedings, Diaz Ex. C, at 6. Further, while Ms. Flores talked with a defense attorney in the courtroom, she told the judge that she did not wish to be interviewed to see if she qualified for an appointed lawyer. *Id.* at 4.

15. In my opinion, this transcript and these facts would have assisted defense counsel in cross-examining Ms. Flores. First, the transcript impeaches Ms. Flores' credibility, because it is directly contrary to her trial testimony. Second, and more importantly, there is an important inference that the jury could have drawn from these facts. The jury could have concluded that Ms. Flores was in fact given a benefit for her testimony. The officer's appearance with Ms. Flores in front of the state sentencing judge signalled the government's support for her. The jury could also have inferred that the reason she declined to be interviewed for appointed counsel was because she knew that she did not need counsel; she knew that she would receive lenient treatment with the officer's help.

16. It may well be that no written plea or cooperation agreement was ever signed by Ms. Flores and government counsel or the district attorney in Clackamas

County. Nevertheless, whether or not a written agreement was signed, defense counsel could have made use of these facts, from which the jury could infer that benefits were given to Ms. Flores for her testimony and cooperation. Further, there are additional facts from which the jury could infer that there was at least an implied agreement. Ms. Flores lived in California, but travelled to Oregon to plead guilty in state court and to testify for the government against Mr. Diaz. One may assume that the state case was not calendared for the same day as the Diaz trial merely by coincidence. In other words, the jury could infer that there were communications between either the case agents (or government counsel) and the district attorney (and/or the state court). The jury could also infer that, as part of those communications, the district attorney learned that Ms. Flores was a cooperating government witness. At trial, Deputy Lowe testified that officers said that they would recommend to the Clackamas County District Attorney that Ms. Flores receive straight probation. RT at 157.

17. In my opinion, these facts should have been disclosed to defense counsel. The government has a duty to disclose more than the existence or non-existence of a written plea agreement. If the government provided any benefits to Ms. Flores for her cooperation, those benefits should have been disclosed, whether or not they were provided pursuant to a written agreement, an informal understanding, or even just a police officer's feelings of gratitude. Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *United States v. Bagley*, 473 U.S. 667, 676 (1985),

impeachment evidence is considered exculpatory evidence. Further, the Ninth Circuit has held that the government has an obligation to disclose facts that imply a tacit understanding between the government and a cooperating witness. *United States v. Shaffer*, 789 F.2d 682, 689-90 (9th Cir. 1986). In sum, the prosecution's obligation is not just to disclose formal agreements, but also to disclose facts and evidence that go to witnesses' credibility. *See also* ABA Model Rule of Professional Conduct 3.8(d) (the prosecutor shall "make timely disclosure to the defense of all *evidence or information* known to the prosecutor that tends to negate the guilt of the accused;" emphasis added); ABA Model Code of Professional Responsibility, DR 7-103(B) (the prosecutor "shall make timely disclosure . . . *of the existence of evidence*, known to the prosecutor . . . , that tends to negate the guilt of the accused, [or] mitigate the degree of the offense;" emphasis added); ABA Standards for Criminal Justice, std. 3-3.11(a), *reprinted in* 50 Crim. L. Rptr. 2061, 2066 (Mar. 4, 1992) (the prosecutor should not intentionally fail to disclose, "at the earliest feasible opportunity, the existence of all *evidence or information* which tends to negate the guilt of the accused;" emphasis added).

18. The government's decision not to disclose the additional facts about Ms. Flores hampered the defense in several significant ways:

(a) as already indicated, the jury did not gain a full understanding of the nature of Ms. Flores' cooperation; the jury did not learn that an officer stood with her and assisted her with her state case. Had the information been disclosed, the jury could have inferred that Ms. Flores received a significant benefit for her cooperation.

Instead, the jury did not have sufficient information to weigh her credibility, motivation and any bias. Without the disclosure of contradictory information, government counsel was able to argue, in her closing argument to the jury, that "[Ms. Flores'] case went to the Clackamas County Circuit Court, she pled guilty and was sentenced as that judge felt was appropriate. She didn't receive a benefit either monetarily or on her charge." RT at 620. At the very least, because an officer stood with Ms. Flores at her state sentencing, the government's argument was incorrect. If government counsel was aware that the officer stood with Ms. Flores at sentencing, then the argument was itself deceitful;

(b) the Court instructed the jury to weigh the testimony of Raynold DeLuca, William Sonnabend, and Donald Burke "with greater caution than that of ordinary witnesses" because of the extent to which they received favorable treatment from the government. RT at 639. The Court did not caution the jury about Ms. Flores' testimony in the same fashion. In my opinion, it would have materially assisted the defense to have the jury similarly instructed to view Ms. Flores' testimony "with greater caution than that of ordinary witnesses;"

(c) present counsel for Mr. Diaz infers (from Ms. Flores' state court records) that the officer present with Ms. Flores was Deputy Randall Scott Spang. *See* Memorandum of Law In Support of Habeas Corpus Petition at 21 n.17. If Deputy Spang was the officer present with Ms. Flores, it should be noted that Deputy Spang was called as a trial witness prior to the testimony of Ms. Flores. *See* RT at 163. The government did not disclose the identity of the officer who accompanied Ms. Flores to her

state criminal sentencing. Because the government never made that disclosure, and because any disclosures about Ms. Flores' criminal case came only upon her own testimony later that morning, defense counsel could not cross-examine Deputy Spang about any assistance he may have rendered to Ms. Flores;

(d) on appeal, the appellate court found that the exclusion of certain character evidence was error, but that the error was harmless in light of the strength of the government's case. *United States v. Diaz*, 961 F.2d 1417, 1420 (9th Cir. 1992). In describing its case to the court of appeals, the government set forth Ms. Flores' role in detail. *See* Brief of Appellee, *United States v. Diaz*, C.A. No. 91-30165 (9th Cir.), at 5. In my view, a thorough impeachment of Ms. Flores would have made it more difficult for the court of appeals to find harmless error. I am given to understand that Mr. Diaz's appellate counsel shares this view. *See* Affidavit of Mildred J. Carmack, Diaz Ex. EE, dated May 6, 1993, at para 5-6.

19. In his § 2255 Motion, Mr. Diaz has also raised an issue about alleged non-disclosure of other impeachment information about Maria Flores. Ms. Flores testified at trial that she was arrested with cocaine on the first day she ever worked for her brother, Jose Bernal. RT at 197. She made substantially the same statement at her sentencing in state court. *See State v. Flores*, No. 90-1179, Transcript of Proceedings, Diaz Ex. C, at 8. Mr. Diaz's counsel alleges that this testimony is contradicted by government witnesses who testified before Ms. Flores' 1990 grand jury, primarily witnesses Deputy Damon

Coates, Deputy Kevin Poppen and Linda Jones. *See* Memorandum of Law In Support of Habeas Corpus Petition at 16 n.13.

20. I understand that the government disclosed, prior to trial, a search warrant and an affidavit signed by Deputy Poppen. *See* Government's Response to Defendant's Motion for New Trial at 5-6. The affidavit reports statements made by Linda Jones. *See* Affidavit of Probable Cause for Search Warrant, dated Dec. 29, 1989. However, neither the record of the new trial proceedings nor the exhibits filed in this § 2255 proceeding thus far reveal whether additional evidence, not contained in the warrant application, was adduced before the grand jury and whether any such additional evidence could have been used for impeachment. Without an evidentiary hearing or further factual development in this Court, it is not possible to determine whether the government had additional impeachment information in its possession prior to Mr. Diaz's trial.

21. If the government did have information in its possession that indicated that Ms. Flores had been involved in cocaine transactions on other occasions, in my opinion, that information would have been useful for the defense at trial. That information would have impeached Ms. Flores' direct examination testimony. Further, that information would have lended some support to the defense contention that she did in fact receive a deal for her cooperation; the evidence would have given her a greater motive to cooperate than if she had only delivered cocaine on one occasion and had only committed one criminal offense. In my opinion, that information

would fall within the same category of impeachment information described in paragraphs 15 and 17, *supra*.

22. In his § 2255 motion, Mr. Diaz also raises an issue concerning alleged non-disclosure of impeachment information about several other cooperating witnesses. With respect to William Sonnabend, Mr. Diaz has argued that the government did not disclose that Mr. Sonnabend would receive favorable consideration in forfeiture proceedings; that the full extent of the benefits to Mr. Sonnabend were not disclosed; and that the prosecution permitted Mr. Sonnabend to testify falsely about dealings with his family. *See* Memorandum of Law In Support of Habeas Corpus Petition at 26-32. The government contends that the plea agreement and the full range of benefits were disclosed to the defense, and that a search warrant (which might have impeached Sonnabend's alleged false testimony) would not have been admissible. *See* Government's Response to Section 2255 Motion at 43-44.

23. Again, without an evidentiary hearing or further factual development in this Court, it is not possible to determine whether any additional, non-disclosed, benefits were provided to Mr. Sonnabend for his testimony. The government has presented evidence that no concessions were granted Mr. Sonnabend in the forfeiture case. *See* Affidavit of Lieutenant Edward M. May, Gov't's Ex. 9, dated July 2, 1993, at para. 4-5. Nevertheless, the government did not seek forfeiture of certain items that it could have forfeited. *See* Letter from J. Russell Ratto to Paul M. Ferder, Gov't's Ex. 7, dated June 20, 1990. What is important to Mr. Sonnabend's testimony in the Diaz case, however, is not simply what formal agreements may have

been reached, but what Mr. Sonnabend *believed* he would receive for his testimony, for a witness' own beliefs affect his motivation and credibility. Two inmates gave statements indicating that Mr. Sonnabend believed that he would receive some benefit in the forfeiture case in exchange for his testimony. *See* Statements of William J. Dixon and Sherman Jackson, Diaz's Ex. J.

24. If any benefits in the forfeiture case were provided to Mr. Sonnabend, or if he was led to believe that he would receive any such benefits, that information should have been disclosed. That information would have added to the impeachment of Mr. Sonnabend at trial. At trial, Mr. Uhle cross-examined Mr. Sonnabend about his plea agreement and the agreement not to forfeit Mr. Sonnabend's father's home. RT at 533. Apart from information that Mr. Sonnabend expected to receive sentence concessions for his testimony, which the jury received (RT at 538-31), additional benefits would have shown an additional motivation to assist the government.

25. Without an evidentiary hearing or further factual development in this Court, it is not possible to determine whether other portions of Mr. Sonnabend's testimony could be impeached or whether the government put false testimony into evidence. Mr. Sonnabend testified that his father was not involved in drug transactions. RT at 534. Mr. Diaz alleges that the government did not produce a search warrant affidavit completed by Lt. May, which describes Sonnabend's dealings with Sonnabend's father and others. *See* Affidavit for Search Warrant, signed by Edward May, Diaz's Ex. Q, dated December 19, 1989, at 13-19. Mr. Diaz also alleges that he

did not receive, prior to trial, the transcript of Mr. Sonnabend's detention hearing. Lt. May testified at Mr. Sonnabend's detention hearing that Mr. Sonnabend's father admitted transporting and hiding cocaine for his son. *See United States v. Sonnabend*, No. CR 90-8, Transcript of Proceedings, Diaz's Ex. Q, at 7. If the facts set out in the affidavit and detention hearing testimony are correct, Mr. Sonnabend testified falsely at Mr. Diaz's trial, with the full knowledge of the government.

26. The government is under a duty not to put false information before the jury. *See Mooney v. Holohan*, 294 U.S. 103 (1935); *see also* ABA Model Rule 3.3(a)(4) (a lawyer shall not knowing offer false evidence; lawyer shall take reasonable remedial measures upon learning of its falsity); ABA Model Code of Professional Responsibility, DR 7-102(A)(4) (lawyer shall not "[k]nowingly use perjured testimony or false evidence"); ABA Standards for Criminal Justice, std. 3-5.6(a), *reprinted in* 50 Crim. L. Rptr. 2061, 2067 (Mar. 4, 1992) (a prosecutor should not knowingly offer false evidence, or fail to seek to withdraw that evidence once a prosecutor learns of its falsity). If Mr. Sonnabend's testimony was false, the government was under a duty to correct the testimony. The government was also under a duty to provide information, in its possession, that could have been used to impeach Mr. Sonnabend's testimony. In my opinion, testimony about Mr. Sonnabend's dealings with his family would have been useful to further impeach Mr. Sonnabend's credibility.

27. With respect to Donald Burke, Mr. Diaz has alleged that the government failed to disclose the full extent of the government's bargain. *See* Memorandum of

Law In Support of Habeas Corpus Petition at 32-35. Again, it is difficult to ascertain exactly what happened without an evidentiary hearing or further factual development in this Court. Mr. Burke was given certain benefits after he testified for the government. The important question is what Mr. Burke anticipated he would receive for his testimony, before he testified. It is not clear from the record exactly what he expected, though he testified that he hoped he would receive some benefit from his testimony. RT at 191.

28. In my opinion, additional information about the exact benefits given to Mr. Burke would have been somewhat useful on cross-examination. The information would have made clear exactly how much Mr. Burke would have gained from testifying; as it was, the reward Mr. Burke expected was vague. Without more detailed information, it would be difficult for the jury to assess the strength of Mr. Burke's motivation to help the government.

29. Mr. Diaz also has alleged that the government did not disclose benefits afforded Raynold DeLuca, namely orders permitting three-day and one-day passes. *See* Memorandum of Law In Support of Habeas Corpus Petition at 25-26. The government contends that any modifications to Mr. DeLuca's sentence were unrelated to his testimony. *See* Government's Response to Section 2255 Motion at 41-43. Once more, without an evidentiary hearing or further factual development in this Court, it is difficult to determine whether any concessions were related to Mr. DeLuca's testimony. In the federal system, furloughs are rarely (if ever) granted to defendants involved in large-scale drug offenses, and federal courts

simply do not order such releases. The record does not show whether furloughs or passes are regularly given to large-scale drug defendants in the Oregon state system. It is possible that rewards were given Mr. DeLuca by the courts simply because Mr. DeLuca, as a cooperating defendant, was looked at more favorably, even if these rewards were not included in any formal plea agreement. If so, as set forth above with respect to Ms. Flores, the jury should have been entitled to hear the facts of any beneficial treatment and decide for itself whether that treatment was expected by the defendant or whether it followed from any tacit agreement or understanding.

30. In my opinion, disclosure of orders releasing Mr. DeLuca on passes would have assisted counsel in cross-examining Mr. DeLuca. It would have been useful in describing additional benefits expected or received by Mr. DeLuca, though the jury was advised that Mr. DeLuca received substantial benefits already for his cooperation. RT at 506-10.

31. In sum, I view the non-disclosures with respect to Ms. Flores to be substantial and quite serious. With respect to Mssrs. Sonnabend, Burke and DeLuca, the government's actions impeded the witnesses' complete cross-examination and impeachment, though it is difficult to determine the full extent that the examinations were impeded without an evidentiary hearing or further factual development in this Court. Given that the defense was entrapment, and given that Mssrs. Sonnabend, Burke and DeLuca were important witnesses on the issue of lack of pre-disposition, the cumulative effect of any non-disclosures could well have interfered with the defense's

ability to establish the defense of entrapment. More thorough impeachments may also have affected the Ninth Circuit's decision that a trial error (the exclusion of character witness testimony) was harmless. *See* Affidavit of Mildred J. Carmack, Diaz Ex. EE, dated May 6, 1993, at para. 8.

D. Issues Concerning Assistance of Attorney Marc Blackman

32. Mr. Diaz alleges that Mr. Blackman, who represented Mr. Diaz prior to trial, provided ineffective assistance of counsel. The main claim is that Mr. Blackman failed to move to suppress evidence found during the search of Mr. Diaz's van. *See* Memorandum of Law in Support of Habeas Corpus Petition at 64-69. The government asserts that any such motion would have lacked merit, and so Mr. Blackman did not violate any duty to his client in deciding not to bring a suppression motion. *See* Government's Response to Section 2255 Motion at 20-24. Mr. Blackman has submitted an affidavit, stating that he did not bring a suppression motion because, in his view, the search would have been upheld on the grounds of consent, the "automobile exception," and/or as "incident to" Mr. Diaz's arrest. *See* Affidavit of Marc D. Blackman, Gov't Ex. 4, dated December 3, 1993, at para. 7.

33. From the transcript of the pretrial motions hearing, it seems that the government would assert consent to uphold the search of the van. Detective Craig Roberts testified at the motion hearing that he obtained consent to search the van at about 7:20 p.m., and that the search was not conducted until after consent was given. RT Motions,

December 21, 1990, at 17, 39-41. However, Mr. Diaz testified at the motion hearing that the officers had the side door of the van open during the time the officers gave Mr. Diaz his *Miranda* rights. *Id.* at 65; *see also id.* at 74 (testifying that officers "were going to keep me handcuffed and continue their search through my van.")

34. Once a defendant moves to suppress evidence seized as a result of a warrantless search, the burden shifts to the government to prove that the search, or a portion of the search, was justified. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497 (1983) (government has burden to show that consent to search was freely and voluntarily given); *New York v. Belton*, 453 U.S. 454, 460-61 & n.4 (1981) (government may search part of car as incident to arrest, but only portions of interior and not separate area such as trunk). Had Mr. Blackman filed a suppression motion, the burden would have shifted to the government to establish that the search was properly conducted under the Fourth Amendment. Because no suppression motion was filed in this case, we do not know whether the government would have continued to argue that the search justified by consent, or whether the government would have asserted any of the additional legal grounds suggested in Mr. Blackman's affidavit. The government may have failed to meet its burden or may have failed to assert a proper basis in law for the search. We do not know because no motion was filed.

35. In my opinion, it is sound defense practice to bring a suppression motion when there has been a warrantless search, unless there are tactical reasons not to file such a motion. These tactical reasons might include, for example, a decision not to call the defendant to testify

due to a desire to avoid cross-examination, or a decision to avoid revealing certain facts that might be crucial to the defense. Before deciding not to file a suppression motion, counsel should weigh the potential benefits if the motion is granted, the potential detriments if the motion is denied, the probability of success on the motion, and any benefits from not filing the motion.

36. In this case, there was no evident tactical reason not to file a suppression motion. During his testimony on the motion to suppress his post-arrest statements, Mr. Diaz gave the basis for a motion to suppress evidence from the search of the van. He testified that the search was conducted before any consent could have been given. Given that Mr. Diaz's testimony would have supported the Fourth Amendment suppression motion, there does not seem to be any tactical reason not to make the legal argument that followed from the facts already stated, under oath, by Mr. Diaz. Withholding the Fourth Amendment motion would not, for example, have kept Mr. Diaz off the witness stand. Mr. Diaz was already a witness at the pretrial motion hearing. And, at that hearing, Mr. Diaz testified to most, if not all, of the facts that would have supported the motion. Without any articulated tactical reason for not bringing the suppression motion, I consider the decision not to file the suppression motion to be outside the range of professionally competent assistance.

37. The primary evidence seized from the van was the handgun. RT at 229-235. Government counsel mentioned the handgun during her opening statement. RT at

17. Had the suppression motion been granted, the government would have been deprived of the use the handgun at trial. In my opinion, evidence of the handgun aided the government's case, in two fashions. First, jurors tend to associate handguns and drug dealers. Evidence of the gun would lead the jury infer that Mr. Diaz was involved in the drug trade. Second, evidence of a defendant's possession of a loaded weapon would tend to prejudice the jury against a defendant, because many people are afraid of weapons and consider defendants who possess weapons to be dangerous.

E. Issues Concerning Assistance of Attorney William Uhle

38. Mr. Diaz has raised several issues concerning alleged ineffective assistance by Mr. Uhle, who was Mr. Diaz's trial counsel. Among the issues include Mr. Uhle's alleged failure to submit voir dire questions about the entrapment defense; the decision to present both the entrapment and renunciation defenses; the alleged failure to investigate further and the alleged failure to seek a continuance or a recess of the trial. *See* Memorandum of Law in Support of Habeas Corpus Petition at 47-60. The government asserts that Mr. Uhle provided effective assistance. *See* Government's Response to Section 2255 Motion at 18-20, 24-31.

39. With respect to the voir dire, voir dire in federal court is generally conducted by the trial judge. Hence, if the defense is to have any meaningful participation, questions must be submitted to the court prior to the voir dire process. In my view, it is extremely important for defense

counsel to submit prospective questions about entrapment when the defense is entrapment. Many jurors may be reluctant to believe that it is possible for government agents to induce a person to commit an unlawful act. It is critical to identify those jurors who do not approach the case with an open mind; the defense must be able to discern those jurors who are unwilling to consider an entrapment defense at all. In my opinion, questions on entrapment should be submitted to jurors when the defense is entrapment, unless there is a specific tactical reason for not doing so.

40. The Defendant's Requested Voir Dire Examination, which Mr. Uhle submitted, contained many appropriate questions. The pleading did not, however, contain any specific questions about the defense theory of entrapment. (Nor did Mr. Uhle submit any questions asking whether jurors would value the testimony of law enforcement witnesses any differently than the testimony of other witnesses). In my opinion, the failure to include questions about the entrapment defense was not reasonable. I cannot discern any tactical reasons why those questions should be omitted in this case. I also note that government counsel recognized that some jurors dislike informants and undercover operations. Government counsel therefore submitted questions about whether jurors had strong feelings against the use of undercover officers or informants. *See* Government's Voir Dire at 2. Defense questions about entrapment were no less important.

41. Mr. Diaz also alleges that Mr. Uhle failed to provide reasonably competent representation because he presented defenses of both entrapment and renunciation.

Most criminal defense practitioners strive to present a credible, consistent defense to a jury, and attempt to avoid presenting conflicting theories. I believe that jurors do not understand or sympathize with conflicting defenses, and jurors consider them to be more legalistic than real. In my view, conflicting defenses should rarely, if ever, be presented to a jury. However, I do not consider the presentation of conflicting defenses to be *per se* unreasonable, provided that counsel has carefully weighed the pros and cons of multiple defenses and has determined (after consulting with the client) that the benefits outweigh the risks. Part of this calculus must necessarily include a determination of the chance of success on each defense and a considered judgment about how the less promising defense would detract from the presentation of the primary and most viable defense. Counsel, not the client, must make this decision. The responsibility for choosing the appropriate defense or defenses rests with the attorney, after consultation with the client. *See* ABA Standards for Criminal Justice, std. 4-5.2(a),(b), *reprinted in* 49 Crim. L. Rptr. 2013, 2018 (Apr. 10, 1991) (certain decisions, such as whether to plead guilty, or whether to testify, belong to the accused; strategic and tactical decisions are made by the defense counsel, after consultation with the accused).

42. I consider the defenses of renunciation and entrapment to be generally antagonistic. The defense of entrapment usually requires the defendant to admit the elements of the offense. The defense of entrapment is a claim that a defendant had no predisposition to engage in illegal conduct, and would have been unlikely to do so absent improper inducement. Renunciation, on the other

hand, is essentially a claim that a defendant should not be punished because he abandoned any intention to commit a crime, prior to taking a substantial step towards its completion. When a defendant raises the renunciation defense to the crime of attempt, the defendant is claiming that no offense of attempt even occurred. In the Ninth Circuit, renunciation merely goes to whether a substantial step has been completed; renunciation is not a defense to attempt *after* the defendant has already taken a substantial step towards completion of the crime. *See United States v. Bussey*, 507 F.2d 1096, 1097 (9th Cir. 1974) ("[a] voluntary abandonment of an attempt which has proceeded well beyond preparation . . . will not bar a conviction for attempt").

43. In my opinion, renunciation could not succeed as a defense in Mr. Diaz's case. Mr. Diaz asserted that, while he was in his van with Deputy Lowe, he renounced any intention to possess the cocaine. RT at 361-63. However, at that point, Mr. Diaz had already given the deputy approximately ten thousand dollars and he had been handed a kilogram of cocaine. In my opinion, he had already undertaken substantial steps to purchase the cocaine. The jury was instructed that the government did not have to prove that Mr. Diaz in fact possessed the cocaine; attempt is established if Mr. Diaz "took such a substantial step to indicate a firm intent to commit the crime." RT at 643. I do not believe that a reasonable jury could have acquitted Mr. Diaz on a renunciation defense, because he had already completed the offense of attempted possession by the time that he made any statements renouncing his intent to complete the offense.

44. In my opinion, it was unreasonable for Mr. Uhle to present both the entrapment and renunciation defenses in Mr. Diaz's case. While an attorney might make an arguably reasonable decision to present both defenses in some cases, the decision to present both defenses was unreasonable here because the renunciation defense was not viable and it detracted from the entrapment defense. The entrapment defense was the primary defense. It was the only viable defense in this case. Elements of the entrapment defense were corroborated by other witnesses. For example, Mr. Diaz's lack of predisposition was attested to by numerous character witnesses. The renunciation defense interfered with the entrapment defense because the jury was distracted from the main defense. In addition, the jury might not believe that Mr. Diaz had in fact renounced any intention to possess the cocaine. The renunciation defense pitted Mr. Diaz's credibility against the credibility of law enforcement witnesses. If the jury disbelieved this portion of Mr. Diaz's testimony, the jury would be more likely to discredit Mr. Diaz's crucial testimony about predisposition and government inducement.

45. In my opinion, Mr. Diaz was prejudiced by the presentation of the two defenses. In part, my opinion is based upon the government's own recognition that Mr. Uhle could not credibly present both. In her closing argument, government counsel pointed out the inconsistencies in Mr. Diaz's two defenses and that these inconsistencies made it difficult to believe Mr. Diaz. She argued:

> "Let's move on to the defendant's testimony, which is significantly easier to talk about.

> Mr. Diaz has come up with a completely incredible version of what happened on June 15. Perhaps if he had stuck with one defense it would not be – perhaps if he stuck with one defense your job might be a little harder. But he hasn't."

RT at 629.

46. Mr. Diaz has also alleged that defense counsel failed to conduct an adequate investigation and failed to seek a continuance when it appeared that counsel was not prepared for trial. As already explained, above, the jury did not receive sufficient evidence to properly assess the credibility and motivation of Ms. Flores. In my view, this is one of the primary areas in which a more thorough investigation would have assisted the defense. Mr. Uhle subpoenaed Ms. Flores' "plea agreement" to the trial, but he was hampered by the fact that Ms. Flores' plea and sentencing did not take place until the morning of her direct testimony in Mr. Diaz's case. As I have already stated, I believe that government counsel should have disclosed the full facts surrounding Ms. Diaz's plea and sentencing. Absent that disclosure, though, it is my opinion that Mr. Diaz should have asked for a recess of the trial so that he could obtain a transcript of Ms. Flores' plea and sentencing prior to Ms. Flores' cross-examination. *Cf.* Fed. R. Crim. P. 26.2(d) (authorizing the trial court to grant a recess so that a defendant who receives *Jencks* material may prepare to use the material in the trial). As I have already stated, the failure to give the jury the full facts about Ms. Flores prejudiced Mr. Diaz.

47. Another claim of inadequate investigation concerns Mr. Uhle's preparation for the cross-examination of

Mr. Sonnabend. As stated in para. 25-26, *supra*, the government should have disclosed the impeaching information contained in Lt. May's search warrant affidavit and detention hearing testimony. It is also counsel's duty to investigate and discover facts to use in impeaching government witnesses. I am given to understand that the search warrant affidavit and the materials from the detention hearing were readily available from the file in Mr. Sonnabend's criminal case. In my view, the failure to gather information from Mr. Sonnabend's case file fell below an objective standard of reasonableness, and prejudiced the defense.

F. Conclusion

48. In sum, I consider the non-disclosures of government counsel to be serious and prejudicial to the defense. Counsel was deprived of an adequate opportunity to confront and cross-examine critical government witnesses, because counsel was unaware of information – in the government's possession – that could have been used for impeachment.

49. With respect to the pre-trial assistance provided by Mr. Blackman, I consider the decision not to file the suppression motion to be outside the range of professionally competent assistance. The defense was prejudiced by this omission because the Court did not have an opportunity to rule upon, and perhaps grant, the motion to suppress evidence.

50. With respect to the assistance provided by Mr. Uhle, I consider several of Mr. Uhle's decisions to be outside the range of professionally competent assistance.

In my opinion, Mr. Uhle's decisions (a) not to submit voir dire questions about entrapment; (b) to present the defenses of entrapment and renunciation, rather than just the defense of entrapment; (c) not to fully investigate Ms. Flores, Mr. Sonnabend, Mr. DeLuca and Mr. Burke; and (d) not to seek a continuance or recess of the trial, which would have permitted him to conduct further investigation, all fell below an objective standard of reasonablenes. In my view, there is a reasonable probability that these errors prejudiced the outcome of the trial. It is also my opinion that the cumulative effect of these errors and the non-disclosures by government counsel prejudiced the trial.

/s/ Charles D. Weisselberg
Charles D. Weisselberg

SUBSCRIBED AND SWORN TO BEFORE ME this 4th day of January, 1994.

/s/ Jacqueline R. Reynoso
NOTARY PUBLIC
FOR CALIFORNIA
My Commission Expires:
1-28-94

(SEAL) OFFICIAL SEAL
JACQUELINE R. REYNOSO
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JAN. 28, 1994

CHARLES D. WEISSELBERG

Address: The Law Center
University of Southern California
University Park
Los Angeles, California 90089-0071

Telephone: (213) 740-2528 (Office)

EMPLOYMENT

Clinical Professor, UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER, Los Angeles, California. Clinical Associate Professor, 1989 to 1991. Clinical Assistant Professor, 1987 to 1989. Courses: Post-Conviction Justice Seminar and Clinical Internship; Predictions of Dangerousness in the Criminal Justice System; Trial Advocacy; Criminal Procedure (to be given spring 1994). Presently supervise law students representing indigent federal prison inmates, criminal defendants and others. Practice includes federal criminal, parole, prison, immigration, civil rights and habeas corpus cases.

Trial Attorney, FEDERAL DEFENDERS OF SAN DIEGO, INC., San Diego, California, 1985 to 1987. Represented indigent defendants charged with federal crimes. Substantial trial and appellate experience.

Staff Attorney and Clinical Fellow, EDWIN F. MANDEL LEGAL AID CLINIC, UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, Illinois, 1984 to 1985. Course: Litigation Methods. As part of clinical program, supervised law students representing mental health patients and prisoners. Cases addressed a range of civil rights, mental health and criminal law issues.

Associate, LILLICK, McHOSE & CHARLES, San Francisco, California, 1982 to 1984. Practiced admiralty and commercial litigation.

EDUCATION

UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, Illinois. J.D., 1982. Officer and Student Attorney, Mandel Legal Aid Clinic. Received Edwin F. Mandel Award for clinical work.

THE JOHNS HOPKINS UNIVERSITY, Baltimore, Maryland. B.A., 1979, with departmental and general honors. Majored in Political Economy. Elected to honor societies in economics and leadership. Taught statistics.

PUBLICATIONS

"Inter-District Variation Under the Guidelines: The Trees May Be More Significant Than the Forest" (with T. Dunworth), 6 *Fed. Sent. R.* 25 (1993).

"Felony Cases and the Federal Courts: The Guidelines Experience" (with T. Dunworth), 66 *S. Cal. L. Rev.* 99 (1992).

"Evidentiary Hearings In Federal Habeas Corpus Cases," 1990 *B.Y.U. L. Rev.* 131.

"Jury Selection" (with W. Alderson) and "Representing the Federal Grand Jury Witness" in *Defending A Federal Criminal Case* (1986).

Work in progress: "Ellen Knauff, Ignatz Mezei, and the Value of a Hearing."

BAR ADMISSIONS

California; Illinois; United States Supreme Court; United States Courts of Appeals for the Third, Sixth, Seventh, Ninth and Tenth Circuits; United States District Courts, all California Districts, and Northern District of Illinois.

PROFESSIONAL ACTIVITIES

Chair, Planning Committee for 1992 USC Symposium on Federal Sentencing. Also presented symposium paper on federal sentencing guidelines and the district courts.

Lecturer, China University of Political Science and Law, Beijing, China, October, 1991. Lectured on prisoners' rights, federal criminal procedure and federal sentencing.

Consultant, Federal Courts Study Committee, 1989-90. Prepared study of evidentiary hearings in habeas corpus cases.

Member, *Ad Hoc* Committee on Attorney Compensation and *Pro Bono* Projects, Ninth Circuit Judicial Conference, 1988-89. Co-authored model plan for appointment of counsel for indigent federal civil litigants.

Member, Committee on Federal Courts, State Bar of California, 1987-90. Co-authored State Bar's comments on proposed amendments to federal habeas corpus statute.

Co-chair, Political Interference Committee, Section on Clinical Legal Education, Association of American Law Schools, since 1988.

Member, Committee on Academic Freedom in Clinical Programs, Society of American Law Teachers, since 1988.

Member, Nominating Committee, Section on Clinical Legal Education, Association of American Law Schools, 1989.

Member, National Association of Criminal Defense Lawyers, since 1986 (Member, Post-Conviction Committee – formerly, Prisoner's Rights Committee – since 1989).

Member, California Attorneys for Criminal Justice, since 1987.

Lecturer, Trial Practice Institute, California Public Defenders Association, San Diego, July, 1988.

Barrister, Legion Lex American Inn of Court, since 1988 (Member, Planning Committee, since 1989).

APPENDIX N

No. 95-35724

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS JUAN DIAZ,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
District of Oregon
The Honorable Helen J. Frye, District Judge Presiding

APPELLANT'S REPLY BRIEF

Sherman M. Ellison, Esq.
Law Offices of Sherman M. Ellison
The Sherman Oaks Galleria
15303 Ventura Boulevard,
9th Floor
Sherman Oaks, California
91403-3110
Telephone: [818] 994-8888

Attorney for Appellant

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS JUAN DIAZ, Plaintiff-Appellant, vs. UNITED STATES OF AMERICA, Defendant-Appellee.	U.S.C.A. NO.: 95-35724 [U.S.D.C. NO.: CV 93-0125-HJF] APPELLANT'S REPLY BRIEF

Appeal From The United States District Court
District Of Oregon
The Honorable Helen J. Frye, District Court Judge

INTRODUCTION

The district court committed reversible error when it failed to grant an evidentiary hearing to resolve *material factual disputes*, relevant to the APPELLANT'S 18 U.S.C. § 2255 petition.

Further, Appellee relies upon legal authorities which is inapposite and which does not control the instant case. Appellee's Brief also includes self-serving, factual assertions, which were not actually ruled upon by the district court and a disingenuous characterization of the facts, designed to mislead this Court.[1]

[1] The Appellant's Opening Brief shall be referred to hereinafter as "AOB". The appellant's Excerpt of Record shall be referred to hereinafter as "ER". The government's Brief of appellee shall be hereinafter referred to hereinafter as "GB".

- I -

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTS FOR AN "EVIDENTIARY HEARING" IN HIS § 2255 MOTIONS.

A petitioner is *entitled* to an *evidentiary hearing* on a motion to vacate a sentence under 28 U.S.C. § 2255, Rule 8 to resolve substantial and materially disputed facts:

> "Unless the motions and files and records of the case *conclusively show that the prisoner is entitled to no relief, the court shall* cause notice thereof to be served upon the United States Attorney, *grant a prompt hearing thereon,* determine the issues and make findings of fact and conclusions of law with respect thereto." [Emphasis added.]

A. Contrary to the government's assertions, there were numerous material issues of fact within appellant's § 2255 petition which raised substantial contentions relating to the prosecutor's withholding of *Brady* discovery material.

These areas of *unresolved disputed facts* and material issues relating thereto include, but are not limited to:

1. Did the government fail to disclose the *Brady* material to the defense attorney?

2. Did Maria Flores receive any case-settlement recommendations by the government regarding her pending case due to her assistance? That is, did the government have some cooperation understanding with Maria Flores, whereby she was to receive a benefit for her cooperation?

3. Did the government knowingly present false/perjured testimony to the trier of fact?

B. Examining the record herein, counsel herein shall summarize some of the exemplary areas of material *disputed facts* which were *never resolved by the district court* at an evidentiary hearing, although such hearing was requested by him.

ISSUE NO. 1: DID THE GOVERNMENT WITHHOLD *BRADY* MATERIAL FROM THE DEFENDANT'S ATTORNEY?

As conceded by the prosecutor in these proceedings, the government admits that it failed to disclose certain *Brady* reports relevant and material to impeachment of the trial testimony of Maria Flores, Deputy Kim Lowe and Det. Roberts. [GB: 2, 7, 9, 12, 25; ER: 139-145.] In the government's brief at page 9 the government states:

> "The government concedes the report of Flores' initial contacts with the Clackamas County Sheriff's Office is newly discovered evidence (ER 139-144). The government also concedes that the Special Consent Form dated January 30, 1990, was not provided in pretrial discovery to defendant (ER 145)".

Nonetheless, the government does not acknowledge, candidly or otherwise, in its brief any of the other *"Newly Discovered Evidence" Brady* documents referred to in the Excerpts of Records [ER: 90-157], including but not limited to the *December 29, 1989* 11-page interview [confession] of Maria Flores. [ER: 107-117.]

Further, the government prosecutor herein stated that she was aware of the fact that Maria Flores was interviewed at the time of her arrest, and that the fact of

this interview was known to both parties [i.e., the prosecution and the defense]. Further, SAUSA-Martin also stated that she advised the defense attorneys of these additional reports and interviews. [CR 138, affidavit of Jennifer J. Martin, SAUSA, dated *March 16, 1995.*]

Unresolved FACTUAL CONFLICT NO. 1

SAUSA vs. The Two Defense Lawyers

1. *The Prosecutor's Version*: Quoting from SAUSA-Martin's affidavit [CR: 138] dated *March 16, 1995*, duly subscribed and sworn to, filed in response to Petitioner's Supplemental Motion in Support of 2255 Petition and Motion to Dismiss for Outrageous Governmental Misconduct, as follows:

> "Although my specific recollection is not good after four years, *I believe I telephoned defense counsel's office about the documents which were not sealed.* While I do not recall speaking with either Mr. Blackman or Mr. Uhle, or which of the two office I called, *I believe I left a message with a staff person that any additional reports needed from the arrest* [of Maria Flores] *could be obtained from Clackamas County.*

[Emphasis and parenthetical phrase added.]

2. *Trial level/Defense counsels' Versions*:

a. *MARC D. BLACKMAN, ESQ.* [ER 158-160], in his affidavit dated *March 9, 1995*, after reviewing his file, which still contained copies of all discovery received from the government during his firm's representation of Mr. Diaz, which said affidavit was duly subscribed and sworn to, stated as follows:

> "3. Based on the above, it is my belief and I hereby represent that *none of the documents appended to Exhibit Supplement #-4*[2] *were provided to me or known to my firm during the course of our representation of Mr. Diaz* and that the government did not produce them in discovery while we represented Mr. Diaz." [Emphasis added.]

b. *WILLIAM UHLE, ESQ.* [ER 161-162] in his affidavit dated *March 8, 1995,* which was also duly subscribed and sworn to, stated therein as follows:

> "Post-conviction relief counsel Sherman Ellison has shown me documents and reports (Exhibit Supp 4) that have been produced after the trial concerning Flores' involvement with drug trafficking and cooperation with members of the arresting agency, ROCN, *I have not seek and was unaware of most, if not all, of this material during the Diaz trial.* It has been approximately four years since I tried this case and Mr. Ellison has my entire file. My memory is not exact, *but I do know that, if I had had some of this material in my possession, I would have used it during the cross examination of Flores, Lowe and Roberts."* [Emphasis added.]

ISSUE NO. 2: DID THE GOVERNMENT HAVE A CASE-SETTLEMENT UNDERSTANDING WITH MARIA FLORES. . WHEREIN SHE WAS TO RECEIVE A FAVORABLE CASE-SETTLEMENT RECOMMENDATION AND

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[2] The reports and documents within *Exhibit Supplement #4* [CR 130] contained the very same documents that comprise the Excerpts of Record herein, at pages 90-157

DISPOSITION IN EXCHANGE FOR HER ASSISTANCE AND COOPERATION HEREIN?

The prosecution has unbelievably contended that Maria Flores did not have any agreement whatsoever, nor did she receive any benefit for her assistance to the government in appellant's case.[3] [GB: 19-21.]

Unresolved FACTUAL CONFLICT NO. 2

between DDA-Gustafson vs. Sgt. Randy Barry

1. *Prosecution's Conflicting Versions: - VERSION NO. 1 – **GUSTAFSON*** SAUSA Martin obtained the affidavit of Dep. District Attorney - TERESE GUSTAFSON, which was annexed to the Government's Response to Defendant Diaz's 2255 motion [CR 109, 110].

This affidavit of Ms. Gustafson, dated *July 1, 1993*, after being duly subscribed and sworn to, states as follows:

> "3. On March 13, 1991, Mary Flores pleaded guilty to count two of the indictment, charging her with *possession* of a controlled substance.
>
> 4. The State of Oregon *agreed* not to proceed on count I of the indictment, charging the *delivery* of a controlled substance.

---

[3] The prosecution also incredibly contended that neither Mr. Sonnabend, DeLuca nor Burke received any benefit whatsoever for their assistance, cooperation and testimony for the government herein.

5. The *plea agreement* resolving the case of State of Oregon v. Mary Flores, Clackamas County Case No. 90-1179 *did not include any concessions or consideration for any assistance* Mary Flores may have provided in the investigation and criminal prosecution of defendant Louis Juan Diaz." [Emphasis added.]

2. *Prosecution's Conflicting Versions*: - *VERSION NO. 2 – **BARRY***

Sgt. Randy Barry testified, under penalty of perjury, on *October 14, 1994* in the case entitled *"United States of America v. Bracamontes"* [ER: 150-157], conflicting with DDA-Gustafson, above.

Sgt. Barry testified that he went with Maria Flores to the Clackamas County court on *March 13, 1991*, the day she pled guilty. Sgt. Barry had discussed the situation of Maria Flores' assistance and his office's position regarding their recommendation in the negotiation of Maria Flores' case settlement with DDA Gustafson. And, that DDA Gustafson agreed to follow their recommendation and allowed her to plead to the lesser charge of possession.

Quoting from Sgt. Barry's testimony at page 185 of the Bracamontes; transcript [ER: 155], as follows:

"Q. *Were there any discussions with the prosecutor before that [Maria Flores'] plea was entered?*

A. Yeah. I'm sure I explained to her what was – *I'm sure I explained to her what the SITUATION was and that she was there to plead guilty.*

Q. It's a woman District Attorney?

A. Yeah. I just went blank on her name.

Q. Gustafson?

A. Yes. Terry Gustafson."

[Emphasis and parenthetical phrase added.]

Further, quoting from Sgt. Barry's testimony at page 187 of the Bracamontes' transcript [ER: 156], as follows:

"Q. And isn't it true that *you assisted in the negotiation* of that case so she didn't have to plead guilty to a *delivery*?

A. It was *our recommendation* that she could – we would not have any objection to her pleading guilty to a *possession based on the fact that she ASSISTED us with some other cases.*

Q. That was your office's position?

A. Correct.

Q. And *the District Attorney AGREED to allow her to plead guilty to the possession charge*?

A. *Correct.*" [Emphasis added.][4]

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[4] Please see GB at page 19, where it now contradicts Sgt. Barry's testimony stating: "The Clackamas County Sheriff's Office did not agree to provide case consideration or any other benefit in exchange for her cooperation."

ISSUE NO. 3: DID THE PROSECUTION KNOWINGLY PRESENT FALSE/PERJURED TESTIMONY?

Unresolved FACTUAL CONFLICT NO. 3

between Governments' Trial Testimony vs.

The Newly Discovered Evidence

The SAUSA-Martin, in her *March 16, 1995* affidavit [CR: 138], has contended that she was aware *in 1990* of the fact that Maria Flores was interviewed by Det. Roberts on *December 29, 1989* and that there were various reports relevant to Maria Flores' arrest, the seizure of large quantities of cocaine, cocaine paraphernalia and seventeen (17) weapons, handguns and rifles, inter alia. [ER: 122-128.][5] The government's prosecuting attorney most assuredly had reviewed the arrest reports and statement/confession [ER: 90-167, in particular 107-117] of Maria Flores before having her primary witness [relating to the entrapment defense] to so testify, and during the pretrial litigation relevant to the discovery motion filed therein. [ER: 3-29.]

---

[5] SAUSA-Martin contradicts herself in GB, at page 2 [the last paragraph thereof] claiming that she "did not *know of* or possess the report in 1990". Whereas, in SAUSA-Martin's above-referenced affidavit, she states "both parties were *aware* Ms. *Flores* had been arrested for possessing nine ounces of cocaine, that she was *interviewed* by Detective Roberts after her arrest . . . "Further, SAUSA-Martin contracts herself again in GB, page 13 [the second paragraph], when she states: "The government notified defense counsel the records were available to defendant at the Clackamas County District Attorney's Office."

As the prosecution concedes, it was aware of the existence of said interview, reports and documents [RE: 90-167], when it presented its case to the jury in this Diaz matter.

Therefore, the government's prosecutor and/or its law enforcement agents *knew* that Maria Flores was falsely testifying about and minimizing her involvement in the cocaine trafficking business, inter alia, when she testified to the jury that she was arrested on her *first time* attempting to delivery cocaine. [RT 219-220.]

A. IMPACT OF NEWLY DISCOVERED EVIDENCE

Let's not forget a major unrefuted factor! It purportedly took the government's agents over *five* (5) months to arrange for Petitioner to *attempt to buy* cocaine from them.

The impact of this new evidence at a new trial would be as follows: As to the issue of "unlawful inducement/entrapment", this case is a function of the credibility. That is, the believability of Maria Flores versus believability of Louis Juan Diaz.

This new evidence would be adversely devastating to the credibility of the primary government witness, Maria Flores, as same relates to the unlawful, persistent attempts to induce and entrap Mr. Diaz herein.

The areas in which Maria Flores' credibility would be severely negated, and which were *never brought out at Diaz' trial,* would include but not be limited to..

[1] the fact that she lied about the number of many times she had been involved with selling, delivering and distribution cocaine;

[2] the fact that she lied about the extent of her involvement with the cocaine trafficking;

[3] the fact that she lied about seeking case consideration for her assistance/cooperation with the government against Mr. Diaz;

[4] that she lied about any benefit received as a result of her assistance/cooperation with the government as it related to her pending cocaine charges;

[5] the fact that numerous weapons [17, including a *machine gun*] were found at her home;

[6] the fact that she lied about there being no "cooperation agreement";

[7] that she was to be paid $2,000.00 per week for her cocaine deliveries for her brother-Jose Bernal;

[8] the fact that she lied to Judge Bagley when she entered her plea; and,

[9] that she and her boyfriend-MAX had taken over her brother-Jose Bernal's cocaine distribution business, while her brother was out of the state.[6]

---

[6] None of the above nine (9) assertions were presented to the jury, effectively or otherwise, due to the prosecution's *Brady* violations.

B. THE FACTUAL EVIDENCE CONTAINED WITH THE "NEWLY DISCOVERED EVIDENCE" [ER: 90-167], WHICH CONTRADICTS THE GOVERNMENT-WITNESSES' TRIAL TESTIMONY OF BEING *CAUGHT ON HER FIRST TIME*, IS OVERWHELMING:

At *ER: 107-117*, the *"undisclosed" Confession of Maria Flores*, which contains numerous *direct contradictions* to Flores' trial testimony, and which contradictions were known to the government, Flores is quoted as follows:

At ER:111:

"Q. Okay. Uh, for delivering this cocaine, you were going to receive how much money?

A. Well, work for a base, whatever, he meets me, I was going to get two thousand dollars is for a week.

Q. Okay, so you get two thousand dollars a week for doing the deliveries?

A. Yes."

At ER: 112:

"Q. Okay. So you bought that truck from him?

A. Mmhmm (yes.)

Q. For how much?

A. I was going to pay it with work.

Q. Oh, with work?

A. Yeah.

Q. What was the total amount you were going to have to pay? Do you know?

A. Five thousand dollars.

Q. Five thousand dollars. So, that basically would have taken just over two weeks to pay off.

A. Mmhmm (yes)."

At ER: 115-116:

Q. Okay. Okay. Uh, you also made a delivery to some people in Beavercreek. Is that right?

A. Uh, not, if you tell me their names. Then, I tell you. Okay? Uh,

Q. Tell me the names.

A. Yeah. I, I meet them in uh, I meet them in the store . . . "

At ER: 116:

"Q. How much did you sell them?

A. Mm, forty two hundred.

Q. Forty two hundred dollars?

A. Yes."

"Q. Okay. Did you make any other sales today?

A. No.

Q. Yesterday?

A. Uh, yesterday, yes.

Q. How many?

A. Uh, one. Only one.

Q. And, how much was that for?

A. Uh, twenty four hundred."

- II -

THE GOVERNMENT HAS MISSTATED THE RECORD *AND* RELIED UPON AUTHORITY THAT IS INAPPOSITE TO THE INSTANT APPEAL.

A. MISSTATEMENTS

1. The SAUSA has misstated the record when she stated in GB at page 24 when she stated that "all aspects of the arrest and seizure of evidence" had been challenged. There was no FRCrP, Rule 41 motion to suppress evidence seized from Mr. Diaz' van without a search warrant.

B. GOVERNMENT'S - PRESENTATION OF FALSE AND PERJURED TESTIMONY

The decision in *Mooney v. Holohan,* 294 U.S. 103 (1935) is informative here. There the Supreme Court held that a conviction could not stand which was based upon the knowing use of perjured testimony. Twenty-four years later the court in *Napue v. Illinois,* 360 U.S. 264 (1959) applied the *Mooney* rule to the prosecution's failure to correct material false evidence although not knowingly admitted by the prosecution.

In *Brady v. Maryland,* 373 U.S. 83 (1963) the Supreme Court extended the principles of *Mooney* and *Napue* to require the prosecution to disclose *potentially* exculpatory

material to the defendant. In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Court held that failure to disclose favorable evidence will result in reversal of a conviction. Evidence is material if there is "any reasonable likelihood [that it would] have affected the jury."

In the Ninth Circuit, the salutary effect of *Brady* applies to either the willful or negligent withholding of material favorable evidence. *Thomas v. United States* 343 Fed.2d 49, 53 (9th Cir.). *Thomas* restates the settled rule that "a conviction cannot stand where a prosecutor has, either willfully or negligently, withheld material evidence favorable to the defendant." Each of the items requested falls within the parameters of *Brady*.

In *United States v. Endicott* 869 Fed.2d 452 (9th Cir. 1989) this Court held that, if the prosecution knowingly uses perjured testimony, or even fails to disclose that the testimony used to convict a defendant was false, the conviction must be set aside if there is *any* reasonable likelihood that the false testimony could have affected the jury's verdict. *Endicott*, however, deals with the *use* of perjured testimony by the government and/or their law enforcement agents.

C. INAPPOSITE CASE AUTHORITY

The government herein relies heavily on *United States v. Sarno* ___ Fed.3d ___, 1995 WL 728212 (9th Cir., Dec. 11, 1995). This reliance is erroneous in that *Sarno* was an appellate proceeding of a FRCrP, Rule 33, New Trial motion appeal. *Sarno* was a false statements to a federally insured bank, fraud prosecution. At Section XIV of the *Sarno* opinion, the court discusses *Brady* obligations *in the*

context of a motion for new trial, citing *United States v. Sitton,* 968 Fed.2d 947, 958-59.

The *Sarno,* at headnotes [91][92][93], discussed the newly discovered evidence, concluding as follows, as to each witness or document: [1] that Mr. Don Reynolds only had inadmissible opinion evidence to offer, whose worth was negligible given the latent bias and self-interest, from which non-disclosure would not give rise to a *Brady* violation; [2] that Mr. Von Hofmann also offered opinion testimony only as to the closing date of the stock swap, and did not call into question the other misrepresentation contained in the submission to the bank; [3] that Mr. Rene Morentin also offered inadmissible lay opinion and heresay, lacked foundation and was arguably cumulative, all again not giving rise to a *Brady* violation; [4] that Mr. Gary Bradley's attitude toward Mr. Knapp was known to the defense, whether he testified or not; [5] that Mr. Allin Karls information was cumulative, but nonetheless the discovered information did not exculpate the defendants therein; [6] that a defense investigator's declaration of statements allegedly made by Mr. Robert Reade was disputed to have been made by him and contained inaccuracies; nonetheless this material in no way contradicted or substantially supplemented his trial testimony; [7] that Exhibit 147, allegedly representing Mr. O'Boyle's "best memory", was most probably not kept from the defense and further that it did not exculpate the defendants; and, [8] that a defense investigator's declaration of statements allegedly made by a Mr. Neely, even if true, were equivocal and not exculpatory.

The *Sarno* court, evaluating the purportedly newly discovered evidence, weighed as a whole and as

described above, held that the cumulative impact of the alleged *Brady* violations did not suffice to support a finding of "materiality" within the meaning of *United States v. Bagley*, 473 U.S. 667 and *Kyles v. Whitely*, ___ U.S. ___, 115 S.Ct. 1555 (1995).

The above-recitation of the *Sarno* newly discovered evidence falls far short of the direct contradictory evidence relating to the false testimony of Maria Flores presented at the Diaz trial.. with the newly acquired/discovered evidence in this instant matter. [ER: 90-167]

CONCLUSION:

For each and all of the foregoing reasons, as well as for the reasons set forth in appellant-Diaz' Appellant's Opening Brief, and the record and exhibits in the post-conviction proceeding, the conviction herein should be reversed based upon [a] the suppression of evidence by the government and/or [b] the government's misconduct in its obstructing justice by presenting false/perjured testimony; and, [c] the ineffective assistance of counsel to appellant at the trial level. This case should thereby be remanded and the District Court should be directed to enter a judgment of acquittal.

Alternatively, based upon the errors herein, the conviction should be reversed and the case remanded to the trial court [a] for a new trial or, alternatively [b] for an evidentiary hearing, Rule 8, as same relates to the issues raised in the § 2255 petition [and related Rule 6 and Rule 7 motions thereon].

Dated: February 21, 1996

Respectfully submitted,

/s/ Sherman M. Ellison
SHERMAN M. ELLISON
Attorney for Appellant
LOUIS JUAN DIAZ

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am resident in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 15303 Ventura Boulevard, 9th Floor, Sherman Oaks, California 91403-3110.

On February 21, 1996, I personally served the foregoing document described as APPELLANT'S REPLY BRIEF on the interested parties in this action by [ ] hand-delivering said document on to the Clerk of the Court as indicated, and [X] placing a true copy thereof in a sealed envelope, with first class postage prepaid, addressed to interested parties, herein, as indicated, as follows:

CLERK, U.S. COURT
OF APPEALS [EXPRESS MAIL]
FOR THE NINTH CIRCUIT
121 Spear Street
P.O. Box 193939
San Francisco, CA 94119-3939

OFFICE OF THE
CLERK [U.S. POSTAL SERVICE]
United States District Court
Attention: *TOM GERHARDS*, Appeal Clerk
United States Courthouse
620 S.W. Main Street
Portland, Oregon 97205-3088

Special AUSA Jennifer
Martin, Esq. [U.S. POSTAL SERVICE]
Criminal Justice Department
240 Cottage Street, S.E.
Salem, OR 97310

Patrick M. Birmingham,
Esq. [U.S. POSTAL SERVICE]
SMITH, BIRMINGHAM and REESE
101 S.W. 5th Avenue, Suite 1625
Portland, Oregon 97204

I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, except as to those matters stated on information and/or belief, and as to those matters, I believe them to be true; and that this Declaration was executed on February 21, 1996.

By: /s/ Sherman M. Ellison
SHERMAN M. ELLISON, ESQ.